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No. 1167

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

C. W. CORSAR, Claimant and Owner of the
British Ship "MUSSELCRAG,"

Appellant,

vs.

J. D. SPRECKELS & BROS. COMPANY,

Appellee.

and

J. D. SPRECKELS & BROS. COMPANY,

Appellant,

vs.

C. W. CORSAR, Claimant and Owner of the
British Ship "MUSSELCRAG,"

Appellee.

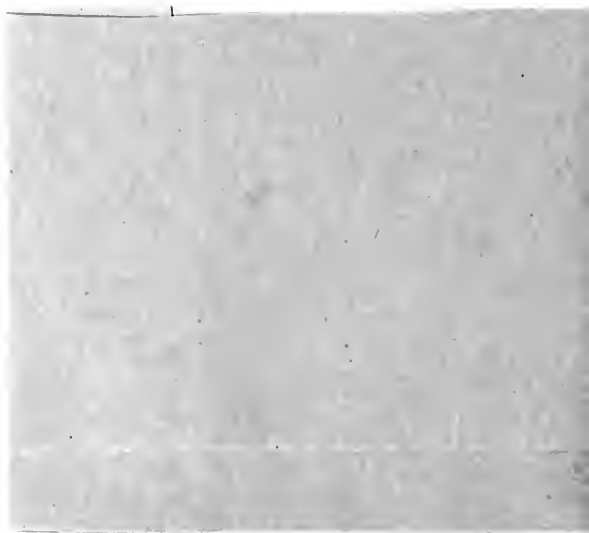
FILED
FEB 25

TRANSCRIPT OF RECORD.

**Upon Appeal and Cross-Appeal from the United
States District Court for the Northern
District of California.**

Records of Circuit
Court of Appeals

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In the United States Circuit Court of Appeals, Ninth Circuit.

J. D. SPRECKELS & BROS. CO.,	}	No. 1167.
vs.		
The British Ship "MUSSELCRAG."		

Libelant,

Stipulation as to Printing Transcript. of Record.

It is hereby stipulated and agreed by and between the respective parties hereto that the log-book sent to the above-entitled court, with the apostles in the above case, need not be printed in the transcript of record by the clerk of said Circuit Court of Appeals.

Dated January 31st, 1905.

NATHAN H. FRANK,

Proctor for Libelant and Respondent.

PAGE, McCUTCHEN & KNIGHT,

Proctors for C. W. Corsar, Claimant and Appellant.

It is further stipulated and agreed that all titles of court and cause be omitted excepting that appearing in the statement and in lieu of such omissions there be inserted "(Title of Court and Cause)."

NATHAN H. FRANK,

Proctor for Libelant and Respondent.

PAGE, McCUTCHEN & KNIGHT,

Proctors for C. W. Corsar, Claimant and Appellant.

“unexecuted as a bond under section 941, R. S. U. S., was given to stay execution of process.”

July 7th, 1900: Claim filed by C. W. Corsar, as claimant, together with an admiralty stipulation for the release of the ship “Musselcrag,” etc., in the sum of \$16,000, which amount was fixed by a stipulation between the proctors for the respective parties, and notice of said bonding was given to the United States Marshal by the Clerk of said District Court.

October 27th, 1902: The above-entitled cause was heard on this day in the District Court of the United States for the Northern District of California at the city and county of San Francisco, before the Honorable John J. De Haven, Judge of said Court.

October 9th, 1903: Opinion filed.

October 27th, 1903: An interlocutory decree that libelant is not entitled to recover for cargo which was jettisoned, but is entitled to recover one-half the damage sustained by the remaining cargo, with interest from the date of filing the libel and costs of suit, was this day filed.

November 29th, 1904: The final decree in the above-entitled cause was filed.

December 29th, 1904: Notice of appeal by claimant C. W. Corsar was this day filed and served.

January 4th, 1905: Notice of appeal by the libelant was this day filed and served.

January 4th, 1905: Stipulation that transcript on appeal by claimant may be used on the appeal of J. D. Spreckels & Bros. Co., was this day filed.

[Title of Court and Cause.]

Libel.

To the Honorable JOHN J. DE HAVEN, Judge of the
District Court of the United States for the Northern
District of California:

The libel of J. D. Spreckels & Bros. Co., a corporation,
against the ship "Musselcrag," her tackle, apparel and
furniture, and against all persons lawfully intervening
for their interest therein, in a cause of contract civil and
maritime, alleges:

I.

That at all the times hereinafter mentioned the libel-
ant was, and still is, a corporation, organized under the
laws of the State of California, having its principal place
of business at the city and county of San Francisco, in
said State.

II.

That between the 30th day of June and the 17th day of
July, 1899, Messrs. Macfarlane, McCrindell & Co., of
Liverpool, England, shipped on board the ship "Mussel-
crag" then and there lying in the harbor of Antwerp, and
bound on a voyage to the Port of San Francisco, in good
order and well conditioned, 18,130 casks of cement, to be
transported by said vessel from said port of Antwerp to
the port of San Francisco, and there to be delivered unto
order in like good order and condition as when received,
the acts of God, Queen's enemies, fire, and all and every
other dangers and accidents of the seas, rivers and navi-
gation of whatever kind and nature soever excepted.

III.

That upon receipt of said cement the master of said vessel signed and delivered to said Macfarlane, McCrindell & Co. three bills of lading, copies of which are hereto attached, and made a part hereof, and thereafter the said MacFarlane, McCrindell & Co. duly endorsed and delivered said bills of lading to this libelant, and this libelant is now the holder thereof.

IV.

That said vessel sailed from said port of Antwerp for the port of San Francisco, with said merchandise on board, where she arrived on or about the — day of June, 1900.

V.

That notwithstanding said libelant has paid the freight upon said cement as in said bills of lading provided, the master thereof has failed and neglected to deliver said cement in as good order and condition as when received, but on the contrary has failed to deliver — casks of said cement which owing to the unseaworthy condition of said vessel, and the carelessness and negligence of said master, were totally lost, to the damage of said libelant in the sum of \$1,233.00, and said master has further failed to deliver — casks in as good order and condition as when received, but on the contrary, owing to the unseaworthy condition of said vessel, and the negligence and carelessness of said master, the same were delivered in a greatly damaged condition, to the damage of this libel-

ant in the further sum of eleven thousand five hundred (11,500) dollars.

VI.

That said vessel is a foreign vessel, and is now in the port of San Francisco, and within the jurisdiction of this Honorable Court, and said vessel is about to leave this port and to leave the United States, and the said master has refused, and still refuses, to pay the said damage, or any part thereof.

VII.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore this libellant pray that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said ship "Musselcrag," her tackle, apparel and furniture, and that all persons claiming any right or interest therein may be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court will be pleased to decree the payment of the sum of \$12,733.00 aforesaid, with costs and interest, that said vessel, her tackle, apparel and furniture, be condemned and sold to pay the same; and that this libellant have such other and further relief in the premises as in law and justice it may be entitled to receive.

J. D. SPRECKELS & BROS. CO.,

Per F. S. SAMUELS,

Actg. Secty.

District of California—ss.

Sworn to before me this 3d day of July, A. D. 1900.

GEO. E. MORSE,

U. S. Commissioner.

ANDROS & FRANK,

Proctors for Libellant.

Exhibit "A."

Redcastle 3,000 Casks Cement

Cannon 5,000 Casks Cement.

8,000 Casks.

T.

1428" 11" 1" 20 at 14/ per ton £1000 0" 0"

Shipped, in good order and condition by Macfarlane, McCrindell & Co. in and upon the good Ship or Vessel called the "Musselcrag" whereof Robt. Johnston is Master for the present Voyage and now lying in the Harbour of Antwerp and bound for San Francisco to say

Eight Thousand Casks Cement

Merchandise, being marked and numbered as in margin and are to be Delivered in the like good order and well conditioned at the aforesaid Port of San Francisco (The Act of God, the Queen's Enemies, Fire, and all and every other dangers and accidents of the Seas, Rivers, and Navigation of whatever Nature and kind soever excepted) unto

Order

or to its Assigns Freight for said Goods to be paid by the consignees at the rate of Fourteen shillings sterling per ton of twenty hundred weights. All other conditions as per charter party dated Liverpool, 21st April, 1899, including Negligence Clause with average accustomed.

In witness whereof, the Master or Purser of the said Ship hath affirmed to Three Bills of Lading all of this tenor and date the one of which being accomplished the other two stand void.

Dated in Antwerp, the 30th day of June, 1899.

Weight and Contents Unknown.

Leakage and Breakage excepted.

ROBT. JOHNSTON.

[Endorsed]: Macfarlane, McCrindell & Co.

Redcastle 3,138 Casks Cement.

Cannon 1,001 Casks Cement.

4,139 Casks.

T.

739. 2. 0. 16 at 14/ per ton £517. 7. 6.

Shipped, in good order and condition by Macfarlane, McCrindell & Co. in and upon the good Ship or Vessel called the "Musselcrag" whereof R. Johnston is Master for the present Voyage, and now lying in the Harbour of Antwerp and bound for San Francisco to say

Four thousand one hundred and thirty-nine Casks Cement

Merchandise, being marked and numbered as in margin and are to be Delivered in the like good order and well conditioned at the aforesaid Port of San Francisco (The Act of God, the Queen's Enemies, Fire, and all and every other dangers and accidents of the Seas, Rivers, and Navigation of whatever Nature and kind soever excepted) unto

Order

or to its Assigns Freight for said Goods to be paid by the consignees at the rate of Fourteen shillings sterling per ton of twenty hundred weights. All other conditions as per charter party dated Liverpool, 21st April, 1899, including Negligence Clause with average accustomed.

In witness whereof, the Master or Purser of the said Ship hath affirmed to Three Bills of Lading all of this tenor and date the one of which being accomplished the other two to stand void.

Dated in Antwerp the 17th day of July, 1899.

Weight and Contents Unknown.

Leakage and Breakage excepted.

ROBT. JOHNSTON.

[Endorsed]: Deliver to Messrs. J. D. Spreckels & Bros. Co., San Francisco, or order. pp. Macfarlane, McCrindell & Co. Andrew McCrindell.

Redcastle 3,000 Casks Cement.

Cannon 3,000 Casks Cement.

6,000 Casks.

T.

1071'' 8'' 2'' 8 at 14/ per ton £750 ''0''0.

Shipped, in good order and condition by Macfarlane, McCrindell & Co. in and upon the good Ship or Vessel called the "Musselcrag" whereof R. Johnston is Master for the present Voyage, and now lying in the Harbour of Antwerp and bound for San Francisco to say

Six Thousand Casks Cement

Merchandise, being marked and numbered as in margin and are to be Delivered in the like good order and well conditioned at the aforesaid Port of San Francisco (The Act of God, the Queen's Enemies, Fire, and all and every other dangers and accidents of the Seas, Rivers, and Navigation of whatever Nature and kind soever excepted) unto

Order

or to its Assigns Freight for said Goods to be paid by the consignees at the rate of Fourteen shillings sterling per ton of twenty hundred weights. All other conditions as per charter party dated Liverpool, 21st April, 1899, including Negligence Clause with average accustomed.

In witness whereof, the Master or Purser of the said Ship hath affirmed to Three Bills of Lading all of this

tenor and date the one of which being accomplished the other two to stand void.

Dated in Antwerp the 13th day of July, 1899.

Weight and Contents Unknown.

Leakage and Breakage excepted.

ROBT. JOHNSTON.

[Endorsed]: Deliver to Messrs. J. D. Spreckels & Bros. Co., San Francisco, or order. pp. Macfarlane, McCrindell & Co. Andrew McCrindell.

[Endorsed]: Filed Jul. 3, 1900. Geo. E. Morse, Clerk.

[Title of Court and Cause.]

Claim of C. W. Corsar.

To the Honorable J. J. DE HAVEN, Judge of the District Court of the United States for the Northern District of California:

The claim of C. W. Corsar, owner of the British ship "Musselcrag" to the said ship, her tackle, apparel and furniture, now in the custody of the marshal of the United States for the said Northern District of California, at the suit of J. D. Spreckels Bros. & Co. alleges.

That he is the sole owner of the said ship, her tackle, apparel and furniture, and that no other person is owner thereof.

Wherefore, this claimant pray that this Honorable Court will be pleased to decree a restitution of the same

to him, and otherwise right and justice to administer on the premises.

C. W. CORSAR,
By his Attorney in Fact,
ROBT. JOHNSTON.

N. District of California—ss.

Robert Johnston, being duly sworn, deposes and says: I am master and lawful bailee of the above-named owners of the ship "Musselcrag," and am authorized to make this affidavit on their behalf. I have read the foregoing claim and know its contents. It is true as I verily believe.

ROBT. JOHNSTON.

Subscribed and sworn to before me this 7th day of July, A. D. 1900.

GEO. E. MORSE,
U. S. Commissioner.
PAGE, McCUTCHEN, HARDING & KNIGHT,
Proctors for Claimant.

[Endorsed]: Filed Jul. 7, 1900. Geo. E. Morse, Clerk.

[Title of Court and Cause.]

Answer.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States, for the Northern District of California:

The answer of C. W. Corsar, owner of the ship "Musselcrag," to the libel of the J. D. Spreckels Bros. Company respectfully shows to the Court:

I.

Answering unto the first, second, third and fourth articles in said libel, the respondent admits the same.

II.

Answering unto the fifth article in said libel, the respondent admits that the master of said ship failed to deliver all of said cement in as good order as when received, and that he failed to deliver — casks of said cement, and that the same were totally lost, but respondent denies that the same or any part thereof were lost, owing to the unseaworthy condition of said vessel or to the carelessness or negligence of the master thereof. The respondent admits that the said master failed to deliver — casks in as good order and condition as when received, and that the same were delivered in a damaged condition, but he denies that the said loss or damage was owing to the unseaworthy condition of said vessel, or to the carelessness or negligence of said master, and he denies that the said ship was unseaworthy or that the said master was careless or negligent, or that the libellant was damaged in the sums aforesaid, or either of them, or in any sum.

III.

The respondent avers that the said loss and damage were caused solely and entirely by the force of the winds and waves and the perils of the sea, which notwithstanding that the said ship had been and was up to that time in all respects seaworthy, so injured and strained her that the sea water, during a long season

of tempests and gales, was forced through her decks into and upon the cargo referred to, wetting and damaging the same. That the master and crew of said vessel took every precaution for the protection of said cargo and that the damage thereto was caused by the act of God and without fault on their part or insufficiency on the part of said vessel.

IV.

Answering unto the sixth article in said libel, this respondent admits the same.

V.

Answering unto the seventh article in said libel, this respondent admits the jurisdiction of this Court, but denies that all and singular the premises are true, except as the same are hereinbefore specially admitted.

Wherefore the respondent prays that the said libel be dismissed and for his costs.

C. W. CORSAR,
Respondent.

By H. L. E. MEYER,
His Attorney in Fact.

PAGE, McCUTCHEN, HARDING & KNIGHT,
Proctors for Respondent.

State of California,

City and County of San Francisco.

}
ss.

H. L. E. Meyer, being duly sworn, deposes and says: That he is the attorney in fact of C. W. Corsar, the respondent in the above-entitled cause; that said Corsar

14 *C.W.Corsar, Claimant, etc., vs. J.D.Spreckels & Bros.Co.*

is a nonresident of the Northern District of California; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

H. L. E. MEYER.

Subscribed and sworn to before me this 8th day of April, 1901.

[Seal]

JAMES L. KING,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 9, 1901. Geo. E. Morse, Clerk.
By J. S. Manley, Deputy Clerk.

[Title of Court and Cause.]

Depositions.

Monday, October 27, 1902.

Appearances:

NATHAN H. FRANK, Esq., for the Libelant.

CHARLES PAGE, Esq., for the Respondent.

This libel now came on for hearing before the Court in its regular order upon the calendar, when the following proceedings were had:

Mr. FRANK.—If your Honor, please, this is an action against the ship “Musselcrag” for damage to the cargo in transit from Antwerp to San Francisco. The libel

sets out the receipt of the cargo in good order; the issuance of bills of lading, copies of which are annexed to the libel state that the undertaking of the ship was to deliver the cargo in good order, perils of the sea and some other exceptions, and, notwithstanding this engagement, they failed to deliver it in good order, but through the neglect of the master and the unseaworthiness of the vessel, it became damaged in the amount of eleven thousand odd dollars.

The answer admits the delivery of the cargo to the vessel under the bills of lading as set forth in the libel; admits the delivery of the cargo to the libelant in San Francisco in a damaged condition, but denies that it was through negligence, and sets up as an excuse perils of the sea.

Of course, our prima facie case is made out by the libel and the answer as they stand of record. The facts, as we think they will appear to your Honor, are that the vessel, at the time of setting sail from Antwerp, was laden with a cargo of cement, a very heavy and compact cargo, and too much cement was placed in the lower hold. Being naturally a stiff vessel, she was so stiff as to become unseaworthy, so that when she got to sea, the action of the rolling threw her back into a vertical position with such great force that when she came off of Cape Horn she opened her decks and suffered other great damage through straining, and let large quantities of water through the decks and upon the cargo.

It will also appear that previous to arriving off the Horn, the master found it necessary to shift some of his cargo from the lower hold up higher in the lower hold—be raised it. After remaining off of Cape Horn for some time in this condition, he finally concluded that he would come around the other way by Cape of Good Hope and via Sydney. Knowing that his decks were in this condition, and that his vessel was very much damaged and injured at this time, he undertook a voyage of several thousand miles across the ocean, when within 60 miles of the point where he then was a port where he could have made full repairs.

Our answer to the suggestion that this damage was due to a peril of the sea, is twofold: In the first place, that the vessel was unseaworthy, and the damage is the result of her unseaworthiness. In the second place, that the damage was largely augmented by the failure of the master to take proper care in the custody of the cargo by putting into port, which was 60 miles off, and make his repairs, instead of going two or three thousand miles to do the same work. That will practically be our case.

Mr. PAGE.—If the Court please, the defense to the case as outlined by Mr. Frank is, that the damage that was caused was caused by a peril of the sea. I doubt if, in all the history of this court, a record has ever been brought into it showing where a ship has been subjected to the trials and tribulations which this ship is shown to have undergone from the time that she struck the River Platte up to the time almost that she

reached a port in Australia as a port of distress. Her crew were battered to pieces. Her cook was washed out of his galley. The last sauce-pan in the galley was lost at the same time. Two boats were washed overboard. She experienced terrible weather. The bulwarks were twisted out of shape. The stanchions that fastened the deck to the between-deck beams were broken away so that the great steel beams were raised up out of their places and out of the ship—

Mr. FRANK (Interrupting).—Mr. Page, you do not understand that this is the time for an argument, do you?

Mr. PAGE.—No; I am presenting my defense. The cement-ways were cracked around the ship, the sails were carried away, the spanker boom was broken, and for thirty-six days there was hardly one hour when the gales were not raging furiously. During all this time all hands were almost all the time ready to jump to whatever was to be done, for the purpose of saving the vessel. The poop sail was spread to prevent the men being washed away, and in order to make it possible that these men might go forward, a ladder had to be stretched from the amidship-house to the mainmast over which they had to crawl. There were thirty-six days of continuous gales, at times of hurricane force, and at times the ship had to lay hove to so as not to have her masts wrenched out of her. For twenty days previous to these thirty-six days, she had undergone very severe weather. As a result of all this, her decks were strained, immense quantities of water poured into her

hold, the cement was saturated with water, thereby adding a large amount of weight to her. She settled down so deep in the water that the master on two occasions thought she would founder on them right then and there before morning came along. I think he jettisoned over four hundred tons of cargo, or over four hundred barrels of cement, I am not absolutely certain which. He had to shift his cargo for the purpose of letting the vessel lie a little more easily, and at the last minute, in order to be relieved from the position of bucking against the enormous seas that were striking her, he turned his ship to the eastward and undertook to make, by the Cape of Good Hope, some port in Australia. He put in at Sydney, New South Wales, where it took him forty-three days to make his ship seaworthy again. The steering gear had been carried away, sails had been carried away, rigging without end disappeared, two of his boats were washed off the decks, and, as I said, I doubt whether any record of this court discloses where such imminent peril has been brought to a ship. Only the bravery of the men and their ability to withstand a diminution of their number—as many as six or seven at a time being incapacitated—could bring a ship into safety out of such perils.

As far as the second defense is concerned, I need only say to your Honor that if it was a mistake on the part of the captain not to fight on until he reached the Falkland Island, to which Mr. Frank referred, that was a mistake he committed in the management of the ship, and under the Harter Act there could be no

liability for that. Under all the circumstances, I doubt very much whether it could be said that he even did make a mistake.

I offer the depositions of David Milne, Edward Lawson, James F. Faraday, and Robert Johnston, master, 2d mate, sailmaker, and carpenter of the ship. The 1st mate was not in San Francisco. He left the ship in Australia and consequently we could not get his testimony.

I also offer the testimony of Leopold Haazen, a witness examined by the libelant in this case, in Antwerp, in reference to the stowage of the ship.

I also offer the evidence of D M. Abts, a witness examined by the claimant in Antwerp, in reference to the stowage of the ship. That is our case.

Mr. FRANK.—I think under the circumstances, as I have to call witnesses to rebut this testimony, both for their information and the information of the Court, this testimony should be read so, as we go along, we will know exactly what the case is.

Mr. PAGE.—Before I finish I ask permission to offer also the log-book of the ship on her voyage, which, it was stipulated, should be used by either side in so far as they might deem it necessary in the course of the trial, as the evidence of the captain. It is referred to in the deposition of the captain, and by stipulation is contained in the deposition.

The COURT.—So far as I am concerned, I do not desire to have the depositions read. Of course, if counsel

is not able to proceed without their being read, I suppose they will have to be read. I will read them all myself again.

Mr. PAGE.—The first deposition is that of David Milne. It reads as follows:

(Mr. Page here proceeded with the reading of the deposition of David Milne until a certain point was reached, when the following occurred.)

The COURT.—Mr. Page, I did not understand that all these depositions were to be read. I understood counsel to refer to depositions taken in a foreign country, the depositions of two witnesses. I have to read all these depositions myself, and it is simply a waste of time reading them here. I understood counsel to say it was necessary he should know something about the contents of a couple of depositions.

Mr. PAGE.—I understood Mr. Frank to mean all the depositions.

Mr. FRANK.—Yes, I did.

The COURT.—I think it is really a waste of my time.

Mr. FRANK.—Very well, your Honor, but I thought it necessary for the purpose of examination of witnesses in rebuttal.

The COURT.—If you are familiar with the depositions, you know how to question the witnesses. I have to read them all myself, anyhow. I cannot carry them in my mind as they are read to me.

(Deposition of David Milne.)

Mr. FRANK.—Very well, your Honor. In the first place, it is stipulated that all the facilities necessary for effecting the repair of injuries to the "Musselerag" occasioned by her voyage, could have been had at Fort Stanley on the Falkland Islands. Is that right, Mr. Page?

Mr. PAGE.—I gave you a written stipulation, and I suppose you are reading it.

Mr. FRANK.—Yes, that is it. If you wish, I will file it as a part of the record.

Depositions of David Milne, Edward Lawson, James Faraday, and Robert Johnston, taken on behalf of claimant before George E. Merse, United States Commissioner for the Northern District of California, at San Francisco, on July 10th, 1900.

DAVID MILNE, called for the claimants, sworn.

Mr. PAGE.—Q. State your name, age, residence, and occupation.

A. My name is David Milne; age, 50; residence, Montrose, Forfarshire, Scotland; occupation, carpenter.

Q. How long have you been with the "Musselerag"?

A. Two years last March—in the beginning of March.

Q. In what capacity? A. Carpenter.

Q. What was the last voyage she made before this voyage to San Francisco?

A. From Liverpool to Sydney, and Sydney to Valparaiso, with coal. Then we went down to Iquiqui, and loaded nitre for Antwerp.

(Deposition of David Milne.)

Q. Were you with the ship at the time that she discharged in Antwerp? A. No, sir.

Q. You were not?

A. No, sir; but I was nearly four weeks aboard of her after I came up from home. I went home after we arrived there, and then joined her again.

Q. When were the ship's decks calked last before the voyage from Antwerp?

A. The last voyage, do you mean?

Q. When were they last calked before the present voyage?

A. In Valparaiso and Iquiqui, the two ports together. We were there a considerable time discharging and loading.

Q. Who did the calking there? A. Me, sir.

Q. Yourself? A. Yes, sir.

Q. Is it customary to get calkers there from shore, or does the carpenter do it? A. No, sir.

Q. The carpenter does it? A. Yes, sir.

Q. To what extent did you calk the decks?

A. I put a thread of oakum into all the seams, all over, fore and aft.

Q. After that what was her condition with reference to calking? A. Good.

Q. How long have you been calking ships as part of your business?

A. I served my time. We do all the calking where I belong to—the building of ships, and calking, and every-thing.

(Deposition of David Milne.)

Q. How long have you been calking?

A. About thirty years, nearly; that anyway.

Q. You say you joined the ship before she left Antwerp. Before you left the ship, did you do anything for the purpose of finding out whether her decks were all right?

A. Before we left?

Q. Yes.

A. Yes, sir; I went down nearly every morning after the decks were wet down in the morning.

Q. Looking for what?

A. For leaks.

Q. To see if any water got through from the wetting of the decks?

A. Yes, sir.

Q. Did you find any?

A. No, sir.

Q. Do you remember, after you got somewhere down towards Cape Horn, finding there was any leak of any kind in the deck?

A. There were some weeps in the deck forward.

Q. Where was that about—in the fore hold?

A. Yes, sir; in the fore hold.

Q. What do you call “weeps”?

A. Just a drop now and again from the seam.

Q. What did you do for that?

A. I calked the seams that I saw were weeping.

Q. Did you do anything else besides the calking?

A. No, sir; I went along underneath the deck as far as I could get, to see if there was any more, but I could not find any.

(Deposition of David Milne.)

Q. When you say you calked the seams where there was some weeping, what did you do? What was the thing you did in order to protect them?

A. I set the seams down and put a thread of oakum into them, and paid them with pitch.

Q. After you had done that, what was their condition? A. Good, then.

Q. Is it a usual or an unusual thing on a voyage to find that some of the seams weep?

A. Yes, sir; it is a very common occurrence.

Q. Is it your business to look after them—is it the carpenter's business?

A. Yes, sir; it is my business to look after them.

Q. Before you got to Cape Horn, or in the neighborhood of Cape Horn, what sort of weather did you have?

A. We had very fine weather until we got up near Cape Horn; not out of the way; a strong breeze; nothing out of the way.

Q. After you got in the neighborhood of Cape Horn, how was the weather?

A. Very bad weather nothing but gales of wind.

Q. And how long did that kind of weather last?

A. I could not say.

Q. Was it a matter of a day, or a matter of a month, or what? A. Each gale, do you mean?

Q. The bad weather.

A. About six weeks; nothing but gales of wind all the time.

(Deposition of David Milne.)

Q. With reference to there being hard gales of wind, or what?

A. Very hard; as hard as ever I experienced.

Q. Did anything happen to your ship during these gales? A. Yes, sir.

Q. What happened?

A. We lost two of our boats.

Q. How did you lose those?

A. They were washed overboard.

Q. Struck by the sea? A. Yes, sir.

Q. Any of your sails carry away?

A. Yes, sir; we lost a lot of good sails, too, new.

Q. Was the cement in any way injured in these gales?

A. Yes, sir.

Q. What happened to the cement?

A. When the decks commenced to leak, they opened out, and you could see the seams nearly, some of them, not all of them; one here and another there, right along the decks.

Q. How was the cement along the water-way?

A. Wet.

Q. Was it cracked in any way? Do you remember whether the cement was cracked near the water-way?

A. On deck?

Q. Yes.

A. It was cracked in the way of the stanchions.

Q. What happened to the bulwarks?

A. The starboard ones were all stove in, and the port ones also. We had to get them repaired in Sydney.

(Deposition of David Milne.)

Q. Where the bulwarks gave way, state whether or not water could get in.

A. Where the fastenings of the stanchions got through the plates.

Q. Could water get in there? A. Yes, sir.

Q. After you arrived in San Francisco, and were able to get down below, and the cargo had been discharged, did you find that anything had happened to any part of the deck or the deck beams?

A. Yes, sir; a lot of rivets in the stanchions were gone. I think nine stanchions in the between-decks and ten in the lower hold, where the rivets were all gone.

Q. What effect had that on the deck?

A. It would have a little. It must, because it is the support of the deck.

Q. Would it strengthen the deck, or weaken it?

A. It would weaken the deck, certainly.

Q. Was anything found with reference to the deck beams near the foremast, or to the deck itself?

A. Yes, sir; the one before the foremast, the stanchion as gone from the between-deck beam, that is, the stanchion before the fore-mast.

Q. What effect had that?

A. The deck rose up.

Q. It raised the deck, did it? A. Yes, sir.

Q. What effect had all this damage upon the resistance of the deck, so as it affected the seams?

A. The stanchion being gone, that would allow the deck to warp.

(Deposition of David Milne.)

Q. What would the seams do?

A. They would open.

Q. Was there any time during the voyage when your ship was not under sail and making way?

A. Yes, sir; we were hove to nearly all the time off Cape Horn, without any sail on her at all.

Q. Did you round the Horn after all?

A. Did we get round?

Q. Yes.

A. Yes, sir; we could not get round.

Q. What hapened to you? How did you get here?

A. We went round east by Australia, in a fair way. You can get round that way, but it is a long passage, of course.

Q. Are you expecting to go with your vessel to-morrow? A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. Do you remember what date it was that you got off the Horn?

A. The last of September or beginning of October.

Q. You said upon your direct examination that you found the decks weeping, and began calking them. Do you remember where you were at that time?

A. We were not far from the Horn. I don't remember exactly. I did not keep no log.

Q. Did you do that more than one time?

A. No, sir.

(Deposition of David Milne.)

Q. Then the entry in the log-book of September 18th, "Carpenter calking main deck," is the occasion that you refer to? A. I suppose so.

Q. You were then in latitude 39.12 and longitude 52.15. Do you know anything about that?

A. Yes, sir.

Q. That is the only occasion upon which you calked the decks upon the passage?

A. No, sir; I was two or three times at them, but that was only put down in the log once.

Q. You were two or three times at them?

A. Yes, sir.

Q. Before this time that is put down in the log, or after?

A. It might have been after. It might have been a day or two. I did it as soon as I got a chance to do it. I was at it two or three times.

Q. Might it have been before this date, September 18th?

A. No, sir; that was the first time I was at them.

Q. Up to that time you had experienced no bad weather?

A. Not particularly. We had strong breezes of wind, but nothing out of the way.

Q. How had the ship acted up to that time—did she roll heavily?

A. Yes, sir; pretty heavy, but nothing particularly with the cargo she had in.

Q. Why do you say "nothing particularly with the

(Deposition of David Milne.)

cargo she had in"? Did the nature of her cargo cause her to roll?

A. Yes, sir. Cement is a very bad cargo for a vessel to roll with.

Q. It is a heavy cargo and low down in the ship?

A. No, sir; it was high enough up in the ship.

Q. It was high enough up in the ship?

A. Yes, sir.

Q. Then why did that cause it to roll?

A. I don't know.

Q. Do you mean to say she had no cement in her lower hold?

A. There was plenty of cement in the lower hold and plenty in the between-decks.

Q. She was chuck full in the lower hold, was she not?

A. No, sir.

Q. How near full was she?

A. It tapered away down from the foremast, down forward.

Q. Did she have all she could carry in her lower hold?

A. Yes, sir, what they liked to put into her, I suppose.

Q. Could she have carried any more in her lower hold?

A. Oh, yes, she could have carried more.

Q. The first real bad weather that you experienced was what you got off the Horn, was it not?

A. Yes, sir.

Q. During this time that you were off the Horn, did you go down and examine the deck from beneath?

A. Yes, sir.

(Deposition of David Milne.)

Q. Now, you say that the deck was raised?

A. After the first breeze that we had, I went down—I went fore and aft—and a good many of the seams were weeping then.

Q. After the first breeze? A. Yes, sir.

Q. I suppose the body of the storm came on after that?

A. The first breeze was as heavy as what we had after.

Q. How long after the first breeze struck you was it that you went down and found the decks weeping?

A. The next day.

Q. Very considerably?

A. Not a great deal then, but they had commenced.

Q. How long did it take them before they opened into the condition you say they were in?

A. There was about a week that I could not go down at all. I could not get down. When I went down again, they were worse.

Q. Then, as you say, some of them were so open that you could see through them; is that it?

A. Oh, no, you could not see through them but you could see the seams cracked in the deck. You could see the pitch cracked in the seams.

Q. When was it that the deck hove up in the center?

A. We had not much time to take notice of it then in the bad weather. It was after we got out of it that we noticed it.

Q. After you got out of the bad weather?

A. Yes, sir.

(Deposition of David Milne.)

Q. How long was that after you turned back?

A. I could not say exactly. It must have been some time, because we had some heavy weather after we did turn back, a strong breeze.

Q. You had some heavy weather between Cape Horn and Sydney? A. Yes, sir, all the way, nearly.

Q. All the way, nearly? A. Yes, sir.

Q. Decks full of water, I suppose?

A. Yes, sir, decks full of water.

Q. During that time, you had no opportunity to repair the decks?

A. No, sir, you could not do nothing.

Q. What was it that you said about the bulwarks being broken in? A. They were broken off the Horn.

Q. To any very great extent?

A. They were all bent in. There was one plate that we had to take off in Sydney.

Q. Did that have any tendency to cause the vessel to leak?

A. The fastening of the stanchions, that is, the support for the bulwarks, the water went through there.

Q. I presume you had nothing to do with going and examining the cargo yourself, did you?

A. Yes, sir, I did.

Q. You found it saturated and wet?

A. Yes, sir.

Q. Before you left Cape Horn? A. Yes, sir.

Q. What can you say with reference to the quantity

(Deposition of David Milne.)

of water that was coming down at that time—great or otherwise? A. There was a good deal going down.

Q. What did you stop at Sydney for?

A. To get repaired.

Q. That is, to repair these damages that you had off of Cape Horn? A. Yes, sir.

Q. Were they of such a nature that you could not make the repairs on the voyage?

A. No, sir, you could not do it.

Q. I suppose you became aware of that fact when you were off Cape Horn? A. Yes, sir.

Q. That they were of such a nature that you could not repair them on the voyage?

A. No, sir, unless you put into port.

Q. If your decks were in good condition when you left Antwerp, how is it that they began weeping before you reached Cape Horn?

A. I suppose coming through the tropics. It is a general occurrence with a good many vessels that some of the seams weep a little, after you get through that very hot weather.

Q. Had not your vessel strained any before that?

A. No, sir.

Q. She had not? A. No, sir.

Q. Are you positive of that? A. Yes, sir.

Q. I suppose you had nothing to do with the stowing of the cargo? A. With the stowing of it?

Q. Yes. A. No, sir.

(Deposition of David Milne.)

Q. You know nothing about that? A. No, sir.

Q. Your business is simply that of carpenter?

A. Yes, sir.

Q. I notice that on August 2d you were engaged in calking the poop deck? A. Yes, sir.

Q. That was before you reached the tropics, was it not? A. Yes, sir.

Q. What was the trouble with that?

A. Our poop was puttied before, and all the putty broke out, and we took what remained then, set it down, and puttied it afresh.

Q. When did you first become aware that the deck had raised in the center? A. After we kept her away.

Q. About how long after?

A. I could not say; perhaps a week or a fortnight.

Q. How long did it take you to run from Cape Horn to Sydney? A. I don't remember.

Q. You do not know?

A. No, sir, I don't remember now; somewhere about two months, I think.

Redirect Examination.

Mr. PAGE.—Q. Is there any cargo under the poop deck?

A. No, sir.

Q. About what month was it that you did the calking at Iquiqui and Valparaiso?

A. In the latter end of October, November and December.

(Deposition of David Milne.)

Q. How long does calking usually last on board a vessel, when you calk the decks all over?

A. It ought to last two years, anyway.

Q. When you say you calked in October, November and December, was that on the voyage to Antwerp?

A. No, sir; in Valparaiso and Iquiqui.

Q. Was that just before the voyage that ended at Antwerp?

A. Yes, sir.

Q. When you took the nitre on board?

A. Yes, sir.

Q. So that it was in December, 1899?

A. 1898.

EDWARD LAWSON, called for the claimants, sworn.

Mr. PAGE.—Q. What is your name, age, residence and occupation?

A. My name is Edward Lawson; age, 40; residence, London; occupation, sailmaker.

Q. Were you the sailmaker on board the "Musselcrag" on her voyage from Antwerp to San Francisco?

A. Yes, sir.

Q. How long have you been going to sea?

A. Since 1880.

Q. How many times have you been around Cape Horn?

A. Somewhere about twenty times; about that.

Q. Was the sail equipment of the "Musselcrag" in your charge?

A. Yes, sir.

Q. What sort of sails had she?

A. First-class; the best she could have.

Q. What sort of a voyage had you until you got toward off Cape Horn?

A. Before we got there?

(Deposition of Edward Lawson.)

Q. Yes.

A. Fine weather all the time.

Q. After you got in the neighborhood of Cape Horn, what sort of weather did you have? A. Very rough.

Q. What was the nature of the weather when you say it was rough?

A. Blowing very hard; the hardest ever I saw down there.

Q. How long did these gales last? Was it continuous bad weather, or one spell and then another spell?

A. It continued all the time after we got down. It continued for about five or six weeks, or more, sometimes harder than others.

Q. During this time of hard weather, what was the effect on your ship with reference to the amount of water she would take on board, for instance?

A. She took an enormous quantity.

Q. How long at a time would her decks be submerged with water?

A. For weeks she was half full of water on the decks.

Q. Where did the men stand during these times?

A. The watch on deck was generally on the poop.

Q. Had they precautions there to prevent being washed off?

A. Yes, sir; a heavy weather cloth in the rigging you could stand under.

Q. Anything else—life-lines? A. Life-lines.

Q. During this time, how were your sails affected?

(Deposition of Edward Lawson.)

A. On one occasion we blew one topsail away; a lower topsail; a heavy storm sail, and a few days after that we blew all the storm sails we had bent away in a very few minutes.

Q. What did your vessel have to do?

A. We could set no sail. We had no sail to set at the time, so we were lying under bare poles and pouring oil through the water-closets.

Q. What was the object of pouring oil out through the water-closets? A. To smooth the water.

Q. Did it have any effect?

A. Yes, sir, great effect.

Q. How was the wind blowing that night; was it blowing hard or not?

A. Blowing very hard, I should say from the north-west.

Q. How was your ship lying with reference to the sea?

A. She was right in the trough of it all night.

Q. Had you any control over the vessel? Could you bring her up at all? A. No, sir.

Q. How often during that voyage off Cape Horn were you obliged to heave to?

A. We were laying to mostly all the time.

Q. How did that voyage compare, with reference to bad weather, with reference to your previous experience round the Horn? A. It was a long way the worst.

Q. How did the ship behave in the seas?

A. She behaved pretty good until she took a lot of

(Deposition of Edward Lawson.)

water in, then she got heavy, and seemed to be getting heavier in the water all the time.

Q. Could you tell whether she had settled at all?

A. We thought so, at any rate.

Q. Anything happen to your boats during this time?

A. We lost two boats one night.

Q. How did they go?

A. The sea struck her and took them out.

Q. Anything happen to your bulwarks?

A. Yes, sir, the bulwarks were bent in on both sides.

Q. How were your stanchions affected along the bulwarks?

A. They were all loosened. They were all taken out in Sydney afterward.

Q. Did you get round the Horn after all?

A. No, sir.

Q. What did you do?

A. We had to steer east and make for the Cape of Good Hope.

Q. In your judgment, during this time, was there any danger of the ship foundering?

A. Yes, sir, there was one night.

Q. What night was that?

A. The night that we had the sails blown away.

Q. Do you expect to go with her on her present voyage?

A. From here?

Q. Yes. A. Yes.

Q. From this port? A. Yes, sir.

Mr. FRANK.—No cross-examination.

JAMES FARADAY, called for the claimants, sworn.

Mr. PAGE.—Q. What is your name, age, residence and occupation?

A. My name is James Faraday; age, 22; I live in Waterford, South of Ireland; occupation, seaman.

Q. Are you at present second mate of the “Musselcrag”?

A. Yes, sir.

Q. When did you join the ship?

A. About twelve months ago the first of July.

Q. Where?

A. Antwerp.

Q. You made the voyage from Antwerp to San Francisco in her?

A. Yes, sir.

Q. Was the vessel loaded when you came on board?

A. No, sir, she was loading.

Q. While she was loading, did you make any examination of the vessel or her decks, or anything of that kind?

A. I had a look all around.

Q. What condition did you find her in?

A. Very good condition, as far as my judgment went.

Q. What sort of a voyage did you have after you left Antwerp until you got to the region of Cape Horn?

A. Very fair until we got down there.

Q. How did the ship behave on that part of the voyage?

A. Coming to the Horn?

Q. Yes.

A. Very fair; pretty good.

Q. What sort of weather did you have after you struck that region of the Horn?

A. Awful bad weather.

Q. What was the effect on the ship?

(Deposition of James Faraday.)

A. She shipped a lot of water and was laboring about very heavily. We lost a lot of sails, ropes and other things.

Q. How long did that bad weather last?

A. I don't know exactly; about a couple of months; all the time we were down there.

Q. How much water did you ship?

A. I don't know. We shipped a lot of water. We were shipping tons of water nearly all the time.

Q. Decks nearly always full all the time?

A. Very near.

Q. Did it affect the ability of the crew to move about on the vessel's decks?

A. Yes, sir, they could not move around at times—for hours at times.

Q. During that time where was the crew?

A. The watch below would sometimes be in the fore-castle. Sometimes all hands would be on the poop on deck, standing by. They could not get around the decks until some of the water got off.

Q. Why would both watches be on deck at the same time?

A. They were not on deck all the time; they would be on deck shortening sail and getting things straightened up that were washed overboard, ropes overboard, and lashing gear down, and taking in sail.

Q. What prevented the ordinary watch on deck from doing those things? Why did you have to have both watches?

(Deposition of James Faraday.)

A. The weather was too bad. It took all hands all the time to do the work, sometimes. Of course, both watches were not on deck all the time. Nearly every day they were at times.

Q. You say sometimes both watches would be on the poop? A. Yes, sir.

Q. What precautions had to be taken at that time to prevent accidents to the men?

A. We had life lines stretched all around the deck, poop and main deck. We had ladders stretched from the after house that you could walk from the poop to, and from there along the mainmast, so as to get along part of the way without going on the deck at all.

Q. How would you get along these ladders—walking or crawling?

A. Crawling along the best way we could.

Q. Hanging on to the rungs?

A. Crawling along on top.

Q. Did you have any cover on the poop back of the masts of any kind?

A. Yes, sir, we had weather cloths up there; canvas lashed to the rigging.

Q. What was the object of those?

A. You would be frozen with the cold, if they were not there, it was so cold, and it would break the seas, and they would not nearly sweep us away if they struck them.

Q. To what extent during these two months that

(Deposition of James Faraday.)

you speak of, off Cape Horn, was the ship compelled to lay to?

A. She was laying to nearly all the time.

Q. Head to the sea, or in the trough of the sea?

A. The sea was beyond the bow sometimes.

Q. How were your sails affected during this time?

A. Nearly all blown away. Several of them were blown at different times.

Q. That is, the sail you could carry in that kind of weather?

A. Yes, sir, everything was blown away at times. We had had no sail at all whatever.

Q. At that time, how was your ship lying?

A. Laying to, like. We had canvas stretched in the mizzen rigging to keep her from falling off into the trough of the sea altogether.

Q. Were you ever under bare poles?

A. Yes, sir.

Q. What was the reason that you were lying under bare poles?

A. The wind blew all the sails away. We could not get a chance. We could not get any sails bent during those gales.

Q. When was this—at night or daytime?

A. In both night and day.

Q. At any time was there, in your judgment, any danger of the ship foundering?

A. Yes, sir, three or four different times I thought she would founder, the sea was so bad.

(Deposition of James Faraday.)

Q. Did you finally get round the Horn?

A. No, sir, we had to put back in the latter end.

Q. Why did you go back?

A. Because we could not get round.

Q. Then you made for Australia?

A. Yes, sir.

Q. After you turned to the eastward, was there an immediate change in the weather, or did the weather still continue bad for a while?

A. Continued bad for some time, but not so bad as off the Horn.

Q. Any damage done to your boats?

A. Yes, sir, we lost two boats down there off the Horn.

Q. How were they carried away?

A. I don't know. They went in the night time. We did not see them in the morning. I did not see them go myself. The watch on deck saw them go. They were completely swept away. There was no trace of them in the morning.

Q. How many boats did that leave you?

A. That left us two.

Q. How were your bulwarks affected, if they were affected at all?

A. They were twisted, bent.

Q. One side, or both? A. Both sides.

Q. How were the stanchions that hold the bulwarks?

A. They were started, too. They were not broke.

(Deposition of James Faraday.)

The stanchions down below were broken. They were bust from the beams.

Q. That is the stanchions that hold the deck beams up? A. Yes, sir.

Q. That you found out in San Francisco?

A. I seen some of them in Sydney, and the rest of them in San Francisco.

Q. How long have you been going to sea?

A. Six years the middle of this month.

Q. How many times have you been around Cape Horn? A. Four times before that.

Q. As compared with your former experiences, how was this weather?

A. It was twice as bad as any time I have been around there. I never saw such bad weather before.

Q. Are you expecting to return with the ship on her present voyage? A. Yes, sir.

Cross-examination.

Mr. FRANK.—The ship was pretty stiff, was she not? A. Pretty fair.

Q. Did she roll very heavily?

A. Yes, sir, she rolled something very bad.

Q. And strained very hard? A. Yes, sir.

Q. She rolled and strained before you got down to Cape Horn?

A. No, sir, she was all right until we got down there.

(Deposition of James Faraday.)

Q. Did she not roll and strain any before you got to Cape Horn?

A. Not a great lot, no, sir; she was all right, like any ordinary ship.

Q. I find an entry in the log on September 29th, "Find seams in fore deck leaking, put on tar and oil on seams through straining." Do you remember anything about that?

A. We had several gales, not very hard. Of course, she rolled and strained several times, but not very bad, like off the Horn.

Q. She rolled and strained sufficient to open her seams before she got around the Horn?

A. Yes, sir, before she got down there. There was oil and something else put on her seams.

Q. That came from her straining and rolling?

A. Yes, sir.

Q. Did you go below at all to examine the cargo?

A. When?

Q. During the voyage?

A. Yes, sir, I was down below at the time we were off the Horn.

Q. What did you find in reference to the water coming through? Was it coming through in large quantities?

A. Yes, sir, I found the decks very damp and wet. I found water in a boat that was down there.

Q. What you call a punt?

A. Yes, sir, when we were down off the Horn.

(Deposition of James Faraday.)

Q. Did you find considerable water in that boat?

A. There was some in it, not a great lot.

Q. Enough to attract attention?

A. Yes, sir, the decks were wet, and the top of the cargo of cement was damp.

Q. Was the cargo wet enough to cause the vessel to sink deep in the water?

A. Yes, sir, I should think it was.

Q. What did you go down there for? You said you went down to take out cargo?

A. Yes, sir.

Q. What did you do that for?

A. To lighten the vessel up.

Q. What did you do that for?

A. Because her decks were open at that time, and she was taking a lot of water and was getting down. There was water in the boat.

Q. By "getting down," do you mean that the ship was settling down deeper into the water?

A. Yes, sir.

Q. On account of the large quantities of water she was taking in?

A. Yes, sir.

Q. Did you go down to take out cargo?

A. I went down to have a look around, to see how things were down there.

Q. Before you got to the Horn, you went down and shifted the cargo, did you not?

A. Yes, sir, the cargo was shifted once. Some cases were shifted from the fore hold up into the between-decks.

(Deposition of James Faraday.)

Q. How far were you down when you did that?

Mr. PAGE.—Down where?

Mr. FRANK.—Down towards the Horn.

A. When we shifted the cases?

Q. When you shifted the cargo.

A. How far were we down?

Q. How far south were you? How many days out were you? A. I don't know.

Q. Some time before you got to the Horn?

A. Yes, sir, that is the time we shifted the cases of bottles, to make clear way for the cement.

Q. That is, you took the cement out of the lower hold and brought it up between decks?

A. No, sir, we took the cement out of the lower hold and threw it overboard.

Q. Before that, you shifted the cargo, before you got to the Horn?

A. No, sir, we did not shift any cement until we got to the Horn.

Q. Are you sure of that?

A. I am not right sure.

Q. You are not sure of it? A. No, sir.

Q. I find an entry here on September 18th, "Hands securing cargo loose fore and between-decks." Do you remember that?

A. Yes, sir; there were cases of bottles that we lashed down there. I don't remember the date.

(Deposition of James Faraday.)

Q. What was the matter with them—how did they get loose?

A. I don't know exactly about loose. We lashed them to the stanchions. We secured them better than they were.

Q. I presume the seas off Cape Horn were not continuous? You would have a storm, and then it would calm down, and afterwards another one would come up, I suppose?

A. They were like that for a good space, most of the time.

Mr. PAGE.—Q. Like what?

A. It would be stormy for a long time. We had one fine day down there, that is all, the day we got the cargo overboard.

Mr. FRANK.—Q. You had other days that were not so severe?

A. They were not quite so bad, but they were bad enough; very bad. There were sometimes, a few hours at a time when it was not so bad.

Q. I find here an entry on October 12th, "Hands employed shifting cargo from fore part of fore hold, and raising part into between decks, and shifting cement further aft and higher in the ship to ease the pitching and straining." Do you remember that?

A. Yes, sir, I remember that, but I don't remember the date.

Q. That was not bottles, was it? You did at that

(Deposition of James Faraday.)

time raise the cement higher in the ship in order to ease her pitching and straining?

A. Yes, sir, we shifted some aft in barrels at one time.

Q. And you also raised it higher in the ship?

A. Yes, sir, a tier higher.

Q. Did that ease the vessel any?

A. Yes, sir, I should think it did.

Q. She did not strain so hard after that?

A. Oh, she strained hard enough.

Q. It prevented her straining as hard as she had been before?

A. It may have had a little effect on her, that is, for one tier. I cannot say how many tiers up we raised it. We may have raised it several tiers.

Q. What do you mean by "One tier"?

A. One height of barrels.

Q. You don't know how many tiers you actually did raise it? A. No, sir.

Q. The object of raising it was to ease her on her straining? A. Yes, sir.

Q. I suppose you raised it as much as you could under the circumstances?

A. Yes, sir, I think we did. I don't think we could have raised it any more.

Redirect Examination.

Mr. PAGE.—Q. Do you remember at that time whether any cement was brought up from the lower

(Deposition of James Faraday.)

hold at all into the between-decks? Do you remember whether it was or not?

A. There was none brought up and shifted from the lower hold to the between-decks. I saw none. There was none done on my watch on deck.

Q. What was brought up from the lower hold?

A. Some cases of bottles were brought up from the fore lower hold and left in the between-decks.

Q. During any of this bad weather, were any of you laid up sick?

A. Yes, sir, I was laid up myself some time.

Q. What from?

A. A spar fell on me. The spanker boom carried away and struck me.

Q. Anybody else hurt?

A. Yes, sir, there was another man hurt at the time. He was hurt while shifting the ventilator. There were several others laid up at the time. Sometimes there were five or six laid up.

Q. At the same time? A. Yes, sir.

Q. From what?

A. Some got hurt around the decks. Some men got struck with seas, and were washed around the decks.

Recross-examination.

Mr. FRANK.—Q. How far were you off of Cape Horn during the time of this storm?

A. We were not very far off, because we sighted the

(Deposition of James Faraday.)

land several times. We sighted Staten Island and Diego Ramirez.

Q. On October 26th, I notice an entry in the log, among other things, "Weather bright and clear at noon, land in sight. Staten Island, after 31 days. Found cargo saturated with water through the excessive straining of the ship and decks." I will go back a little further and read: "Laboring, straining badly. Deck still flooded. Sea went down about midnight. In the morning took fore and aft hatches off." Then comes that about finding the cargo saturated, and so forth. Do you remember that occasion?

A. What occasion?

Q. When you took off the hatches, and that the weather was bright and clear at noon, and you found the cargo saturated with water, and you sighted Staten Island, on October 26th?

A. I think that must have been the day we went down and took the cargo and threw it overboard.

Q. That is the day before you went down, according to the entry here.

A. I was not down that day myself.

Q. That was about the time you turned about and made for Sydney, was it not?

A. Yes, sir, that is before we made for Sydney.

Q. About the day before? A. No, sir.

Q. How long before you came about?

A. Some time after that. I don't know when it was.

(Deposition of James Faraday.)

Q. That was about five or six days before you started for Sydney?

A. Yes, sir, it may have been that. I know it was some time.

Q. On October 30th, I notice another entry: "Westerly gale, heavy seas at times, rolling and straining heavy, flooding the decks. High land in sight to northward." Do you know what land that was?

A. No, sir.

Q. It must have been about Cape Horn, must it not?

A. The land off Cape Horn or Staten Island.

Q. You had not made any headway one way or the other?

A. No, sir; we were drifting.

Q. November 4th I notice an entry, "Decided to run east by Cape of Good Hope." Do you know if that was the time that you decided to turn about?

A. I don't remember the date. I remember the day, though.

ROBERT JOHNSTON, called for the claimants, sworn.

Mr. PAGE.—Q. What is your name, age, residence, and occupation?

A. My name is Robert Johnston; age, 47; residence, Aberdeen; occupation, master mariner.

Q. What is your present occupation—of what ship are you the master?

A. Master of the bark "Musselcrag."

Q. How long have you been a master?

(Deposition of Robert Johnston.)

A. For 20 years.

Q. In command of large ships all the time?

A. Yes, sir.

Q. When did you join the "Musselcrag"?

A. In Antwerp, about twelve months ago.

Q. Previous to her starting on the voyage for San Francisco? A. Yes, sir.

Q. Which has just been terminated?

A. Yes, sir.

Q. Before leaving Antwerp on this voyage, what was done towards preparing the ship; what did you do, in the first place?

A. I looked all over the ship, and satisfied myself that everything was in order; found everything in very good order.

Q. What is the ship's registered tonnage?

A. 1871.

Q. What is her carrying capacity?

A. About 3,364 tons we have in now.

Q. Of wheat? A. Yes, sir.

Q. Any lumber besides that?

A. Yes, sir; there is a good deal of lumber there; lumber for the lining.

Q. Have you any idea how many tons that would be?

A. About 25 tons, I suppose.

Q. What was done with reference to preparing the ship before she left Antwerp?

A. The ship was all thoroughly cleaned out, her limbers lifted, scantling taken down.

(Deposition of Robert Johnston.)

Q. Her ceiling? A. Yes, sir.

Q. Sparring? A. Yes, sir.

Q. Where does that come?

A. The sparring runs along between the frames of the ship, fore and aft, and also up and down the between-decks.

Q. What was done then?

A. The ship was thoroughly cleaned and painted inside.

Q. Painted outside? A. Yes, sir.

Q. Where was she when all this was being done?

A. At Anwerp, in the drydock.

Q. Do you know how old that ship is?

A. About four years now.

Q. How long were you by the ship while the cargo was being taken aboard? A. About a month.

Q. In stowing the cargo, was any precaution—and if so, what precaution—taken for the purpose of making an allowance for a heavy, deadweight cargo?

A. Yes, sir; the cargo was raised from the sixth tier, up.

Q. Will you explain what the difference is between raising a cargo in the hold, as you say, and not raising it?

A. If we did not raise it, the barrels would be stowed bilage and cuntling. When you raise the cargo, you put inch pieces of board over the sixth tier, which would raise the next tier, and so on.

(Deposition of Robert Johnston.)

Q. That is, when you begin raising at the sixth tier, do you lay the same scantling between each successive tier? A. Yes, sir.

Q. Up to the beams? A. Yes, sir.

Q. What effect would that have in diminishing the occupied space in the hold?

A. I should say by nearly a barrel when it got to the between-decks.

Q. That is, the diameter of a barrel?

A. Yes, sir.

Q. Ordinarily, in stowing cargoes at Antwerp, where is this raising begun? A. At the eighth tier.

Q. In the case of your ship, why did you begin at the sixth tier?

A. I think the owners wished to keep the ship as lively as possible. The ship was naturally a beamy ship and a stiff ship.

Q. What do you mean by a "beamy" ship?

A. A large beam.

Q. Was the lower hold full?

A. There was room for another cask between the beams. The ends of her were empty.

Q. Were the between-decks full up to the beams?

A. There was room for another tier.

Q. How much did you have in the lower hold in weight? A. About 2,350.

Q. How much did you have in the between-decks?

(Deposition of Robert Johnston.)

A. We had 928 tons in the between-decks, as near as I could guess.

Q. Under whose superintendence was the cargo loaded? A. Under mine.

Q. In your judgment as a ship master, was that cargo properly stowed? A. Yes, sir.

Q. With reference to the ship's carrying capacity, was the cargo a small cargo, or a large cargo, or a suitable cargo, or what?

A. A suitable cargo. The ship was loaded to her marks.

Q. When you say she was loaded to her "marks," what do you mean? A. Light water draught.

Q. At the time that the ship was loaded, where was she laying? A. In the Scheldt, fresh water.

Q. The effect of leaving the fresh water and going into the salt water would be what on raising or lowering those marks?

A. It would raise it six inches.

Q. She would be lying six inches out of the water after leaving the fresh water, than she was at that time?

A. Yes, sir, six inches more freeboard.

Q. In your judgment, what was the condition of the vessel then with reference to seaworthiness?

A. Good condition; excellent condition.

Q. Do you remember what day you started from Antwerp on your voyage? A. The 19th of July.

Q. 1898? A. 1899.

Deposition of Robert Johnston.)

Q. Up to the time that you got near the Horn, what kind of weather had you, as a rule?

A. Fair weather. When we got down towards the Platte, we had the usual pretty heavy seas, but the weather was not excessive until we got to the Horn.

Q. Up to the time that you got to the Horn, how had the ship behaved? A. Behaved well.

Q. Is this ship a ship that carries sail equipment easily? A. Yes, sir, she is light sparred.

Q. At the time that you got as far as the Horn, what evidence had the ship given, if any, of being too stiff, or being too cranky?

Q. You had very bad weather, did you not, after that? A. Very bad.

Q. Taking your experience in your previous voyages, how did the weather compare during this voyage with the weather that you have seen on other occasions?

A. I never had seen such heavy weather off Cape Horn.

Q. Where is the first mate now? Is he still by the ship?

A. No, sir, the first mate left in Sydney, New South Wales.

Q. Who kept the ship's log? A. The first mate.

Q. Had you anything to do with it yourself?

A. Yes, sir, under my supervision.

Q. To what extent were the entries that he made your entries, or entries that you supervised?

(Deposition of Robert Johnston.)

A. We always discussed the entries to be made in the log.

Q. Each day? A. Yes, sir, each day.

Q. State whether or not you examined the log as he made the entries?

A. I got the log for my examination generally every second day; never less.

Q. Did you sign the log yourself? A. Yes, sir.

Q. Where the log is signed on successive days, when was the signature made?

A. That would be the day he presented it—that is, each successive day.

Q. Now, will you be good enough to give a history of the voyage, beginning at the time that the first bad weather showed itself. Begin far back enough to be able to give the whole history of the voyage, using the log as much as you can.

A. On September 17th there is the following entry in the log-book: "Fresh breezes, with head sea. Ship under topsails and mainsail. 4 P. M., more moderate"—

Mr. FRANK.—I do not know that you can introduce the log in that way.

Mr. PAGE.—Q. Look it over, Captain, and tell what happened upon that day, that is, of interest.

A. We had heavy seas and heavy squalls. The ship was rolling heavily.

(Deposition of Robert Johnston.)

Mr. FRANK.—I think I prefer that you read the log, Captain. Go back and read it.

(It is stipulated that the log may be introduced in evidence, and read by either of the parties. The log is marked "Exhibit A.")

Mr. PAGE.—Q. The entries as they appear in that log, you say, were the true entries of the facts as they occurred at the time? A. Yes, sir.

Q. How long did the bad weather continue? When did it begin?

A. We had 36 days of it off Cape Horn.

Q. When did it begin?

A. About the 25th of September, 1899, we commenced to have bad weather. We rounded St. John's light on the 27th. The bad weather continued until the 4th of November, when we squared away and run to the eastward.

Q. Why did you run to the eastward?

A. The ship seemed to becoming more laborsome, and the bad weather continuing, we thought we had damaged ourselves sufficiently, and so run to the eastward to save further damage.

Q. Had you the object in view of seeking a port?

A. No, sir.

Q. After the first bad weather, did you make any investigation to find out whether any harm had been done to the ship, or whether she was leaking, or anything of that kind?

(Deposition of Robert Johnston.)

A. Yes, sir. We always kept the pumps sounded, and made a careful examination around the decks.

Q. Did you lift the hatches?

A. Yes, sir, we lifted the hatches at the very first opportunity.

Q. Do you remember when that was?

A. The 29th of September.

Q. What did you find then?

A. We found some of the seams weeping in the fore part of the deck.

Q. Had you then had any bad weather?

A. Yes, sir; the decks were not weeping to any great extent.

Q. Is that the time that the carpenter spoke of, when he made some repairs to the seams?

A. Yes, sir, the carpenter attended to the seams. We put tar and oil on the decks, which helped them a little.

Q. What was the nature of the damage that occurred during the time that you were off Cape Horn? State from your recollection now what happened to the ship.

A. We lost a spanker boom; smashed the wheel and steering gear boxes; lost two boats, three topsails, two mizzen staysails; twisted the bulwarks on both sides; started the bulwark stanchions on both sides, cracking the cement around them. We also lost a considerable amount of running gear, blocks, etc. All the galley furnishings were washed completely out of the galley, and the cement in the galley flooring was disturbed and broken. I think that is the principal damage.

(Deposition of Robert Johnston.)

Q. What effect had it on the decks themselves?

A. The decks were strained, of course.

Q. When you say the decks were strained, what effect had that on the seams?

A. That opened the seams.

Q. Do you know whether any water got into the ship by reason of the cracking of the cement near the waterways and the fastenings of the stanchions loosening?

A. Yes, sir, you could trace the water down the ship's sides now. Captain Metcalf saw that when he was on the ship at the dock here.

Q. This water that went down through the decks and through the various holes that were made by reason of the injuries that the ship suffered, where did that bring up—in the bilge, or where?

A. No, sir, it was absorbed by the cement.

Q. At any time was there any great quantity of water in the bilges?

A. No, sir, never more than two inches in the well.

Q. Would the pumps suck at that?

A. No, sir, the pumps would not fetch at that.

Q. What effect had the absorption of the water by the cement on the weighted cargo that you were carrying?

A. I should say considerable.

Q. State how continuous these 36 days of gale were?

A. It was continuous bad weather; blowing almost with hurricane force at frequent intervals.

(Deposition of Robert Johnston.)

Q. Was your ship making way during the time, or laying to?

A. She would head reach a little at times, and then we had to heave her to again.

Q. What was the condition of the decks during these 36 days or so of the storms, with reference to the amount of water they were carrying?

A. They were getting worse. The more the ship strained, the more the decks strained.

Q. I mean with reference to the amount of water that the decks were carrying.

A. They were completely flooded.

Q. Would they be relieved at times, or would the flooding be continuous?

A. Almost a continuous flooding.

Q. Where would your crew be during these times?

A. The watch on deck always aft on the poop. That was the only safe place for them.

Q. Was the single watch sufficient always to do the work?

A. No sir, we had to have all hands out every now and again.

Q. For what purpose?

A. Getting the ship round and making and taking sail, to keep her steady in the sea way, as the wind increased or lulled.

Q. What precautions if any, were taken for the purpose of preventing accidents to the men?

(Deposition of Robert Johnston.)

A. We had life lines stretched fore and aft the decks and across the poop, weather cloths.

Q. Did you hear the mate say something about a ladder?

A. I had a ladder stretched from the amidship-house to the mainmast.

Q. For what purpose was that stretched?

A. To enable them to get fore and aft without going on the deck.

Q. Was that to prevent their being washed away?

A. To prevent their being washed away.

Q. How many of the men were hurt during these 36 days?

A. Four or five of them were down at a time, sometimes, all through accidents and injuries.

Q. When you say that you had four or five of them down, what did you mean?

A. Incapacitated; off duty. Not through liquor.

Q. How did the fresh water hold out?

A. The fresh water held out very well. At times we had a great difficulty in getting it up from below.

Q. How about food, and tea, and things of that kind?

A. We had to do without tea and coffee frequently.

Q. Why? A. Because we could not cook it.

Q. During this time, in your judgment, were there any occasions when there was any danger to your ship?

A. Yes, sir, I thought on one or two occasions that she would in all probability go away with us before morning.

(Deposition of Robert Johnston.)

Q. Go away with you in what direction?

A. Down.

Q. After having gone to the east where did you bring up next? A. Sydney, New South Wales.

Q. What did you do there?

A. Repaired the damages.

Q. Why did you go into Sydney, New South Wales?

A. I should have been short of provisions if I had gone further and taken much longer time. I lost some provisions during the bad weather, as stated in the log.

Q. You put in there as a port of distress?

A. As a port of distress. Our steering gear carried away just after we passed through Bass Straits.

Q. Where is that?

A. That is between Van Diemen's Land and Victoria.

Q. What caused it to carry away?

A. Heavy weather.

Q. At what time?

A. It had evidently been carried away off the Horn, although we did not know it. We brought her to the wind one night, expecting a shift from the northwest. There was a nasty sea running, and the steering gear carried away.

Q. What made you then think that the steering gear had previously been weakened off Cape Horn?

A. We could see that. One-half of the pin had been broken previously.

Q. You had not been aware of that fact until then?

A. No, sir.

(Deposition of Robert Johnston.)

Q. How long were you at Sydney?

A. Forty-three days.

Q. Engaged in what during that time?

A. Making repairs.

Q. Did you find at Sydney anything else that was to be repaired, excepting what you have already given us as the damages?

A. I found that she had raised her beams alongside the foremast, and parted the stanchions from the between-deck beams.

Q. What was the nature of the repairs that you made at Sydney?

A. These beams were set back to their original position; the stanchions re-fastened and the decks calked; the stanchions and the water-ways re-fastened, and the bulwarks set back into their places; new boats, and two lower topsails, and two mizzen staysails; the steering gear was also repaired, and the wheel and the decks were calked fore and aft. The cement in the galley that was broke out was replaced. The stove was repaired, and other general repairs made.

Q. Were these repairs that were made in Sydney, all incident to the weather that you had had at Cape Horn?

A. Yes, sir.

Q. At that time the cargo was not broken out, as I understand?

A. No, sir, it was a little disturbed, to get at the bottom of the stanchions in the lower hold.

(Deposition of Robert Johnston.)

Q. When you arrived at San Francisco, what further damage did you discover had been caused there?

A. We found nine stanchions in the between-decks loose at the head, and ten in the lower hold.

Q. What effect did that injury, at the time that it happened, have upon the stability of your decks?

A. It would leave the decks free to move. There is no doubt, their being carried away, increased the opening of the seams.

Q. Was there any other damage that you have not mentioned now that you discovered in San Francisco?

A. No, sir.

Q. Can you now recollect about what the cost in Sydney was of your repairs?

A. One thousand seven hundred pounds.

Q. Was your stay in Sydney prolonged beyond the time that it was necessary to make these repairs?

A. Not beyond the contractor's time?

Mr. FRANK.—What is the object of this?

Mr. PAGE.—That we did not dilly-dally on the voyage.

Q. Your stay there was not prolonged beyond what was necessary for the repairs? A. No, sir.

Q. What is the total length of that entire voyage, from Antwerp to San Francisco?

A. Three hundred and thirteen days.

Q. Nearly eleven months? A. Yes, sir.

(Deposition of Robert Johnston.)

Q. And the usual voyage, taking one with another, is what?

A. One hundred and forty, I presume; that would be about it.

Q. About one hundred and forty days?

A. Yes, sir.

Q. To go back to the serious times around Cape Horn: What effect, so far as you then knew, did the amount of water that was reaching the cement have upon the ship herself, with reference to lifting or settling her in the water?

A. The ship appeared to labor more heavily than she had done, and I thought that she must be settling a little.

Q. Thereupon what did you conceive it proper to do?

A. I jettisoned some of the cargo, after consulting with the officers and petty officers.

Q. About how much did you jettison?

A. From four hundred and forty to four hundred and fifty barrels of cement. I could not be exactly sure of the number. The second mate tallied them, but he is not quite sure.

Q. During that period of time, was your cook injured?

A. Yes, sir, the cook was laid up for a while.

Q. How was he injured?

A. Washed out of the galley with the furnishings.

Q. Did he take the stove with him?

(Deposition of Robert Johnston.)

A. No, sir, that was the only thing that remained. He cooked in oil tins from the Horn to Sydney.

Q. Why was that?

A. All the utensils were gone

Q. Have you any idea about how many of your crew were incapacitated at different times during these 36 days of hard weather?

A. From two to four, and sometimes five of them were laid up.

Q. At a time? A. Yes, sir.

Q. Taking the whole crew through, have you any idea about how many of them did, at one time or another, have to lay up?

A. I should say six or seven. They are all logged.

Q. Was your second mate amongst them?

A. My second mate was amongst them.

Q. And any of the other officers?

A. No, sir, I think not.

Q. How many mates do you carry?

A. Three. Two certificated officers.

Q. You are expecting to go to sea to-morrow, Captain? A. Yes, sir, as soon as possible.

Cross-examination.

Mr. FRANK.—Q. When you jettisoned that cargo, did you take out the most wet cement?

A. We took the cement from immediately underneath the hatch. We had not much option—that which was handiest.

(Deposition of Robert Johnston.)

Q. Did you notice whether it was damaged?

A. Oh, yes, it was wet.

Q. On your way from Cape Horn to Sydney, I presume you had your decks more or less covered with water?

A. Yes, sir, we had an exceptionally heavy passage alone.

Q. Did you examine on that trip to see whether water was coming through into your ship, or were you satisfied that it was coming in?

A. No, sir; we examined her closely. She did not appear to be making as much water through the decks as she had been.

Q. Still, she was making considerable?

A. A little; not much. We were running before it.

Q. Her decks were open?

A. Her decks were open, but the ship was not laboring so much. She was running easy.

Q. I notice considerable entries of her laboring

A. Yes, sir, but not so much as she was off the Horn.

Q. How much she was taking, you do not know?

A. No, sir.

Q. This cracked condition of the cement, what would that indicate to you with reference to the working of the sides of the vessel?

A. It indicated, in all probability, that the stanchions were started; that there had been a movement.

Q. You noticed that while you were off the Horn, did you not? A. Yes, sir.

(Deposition of Robert Johnston.)

Q. I suppose the question of whether a vessel is loaded down to her marks or not has nothing in itself to do with her stiffness or otherwise? That depends upon the nature of her cargo, and the manner in which she is stowed, does it not? A. Quite so.

Q. A vessel may not be laden down to her marks by considerable degree, and yet be a very stiff ship?

A. Yes, sir.

Q. Was the "Musselcrag" a vessel of deep hold?

A. Pretty fair depth of hold.

Q. What is the depth of her lower hold?

A. I could not tell you exactly that.

Q. You do not know?

A. No, sir, not without reference to the register.

Q. Do you know the depth of her between-decks?

A. No, sir; I should say eight feet. Eight or nine feet, I suppose, the between-decks are.

Q. Do you know her draught?

A. Yes, sir, her draught of water.

Q. What was her draught upon this occasion?

A. 21 forward, and 21.9 aft, when we arrived in Sydney.

Q. Do you know what her freeboard was?

A. Two inches free of her center bar.

Q. That would give her how much freeboard?

A. 5.3, I should say.

Q. How high was her bulwarks?

A. That has nothing to do with her freeboard.

(Deposition of Robert Johnston.)

Q. That would give her about 27 or 28 feet depth of hold? A. Yes, sir.

Q. Did you have much of this cement in the between-decks?

A. About 928 tons of cargo in the between-decks. I think there were about 102 of general cargo altogether.

Q. I believe you testified you had 2,350 in her lower hold? A. About that.

Q. Is the ship naturally a stiff ship, do you know?

A. Yes, sir, I should say she was naturally a stiff ship.

Q. Unusually so?

A. No, sir, not unusually so; not for a ship of her class and construction, up-to-date vessel.

Q. Do you know where you were, by consulting your log, on the 17th day of September?

A. 39.34 south; 52.01 west.

Q. On November 4th where were you?

A. 56.34 south; 60.34 west.

Q. About how far is that from Staten Island?

A. South of Staten Island; not very far.

Q. About how far? Within sight of the Island, is it not? A. It is not far from the Island.

Q. It is not far from Staten Island?

A. No, sir.

Q. It was about 60 miles from Staten Island at that time when you turned about? A. Yes, sir.

Q. Why did you have all these repairs made in Sydney, when you say you only went in there for provisions?

(Deposition of Robert Johnston.)

A. I went in there for provisions and repairs. I went in in distress.

Q. When you said, in answer to your direct interrogatory, that you went in for provisions, you did not mean to say that was the only reason?

A. No, sir; I would have to go in to attend to my steering gear. That would have put me into Sydney.

Q. Is that all?

A. No, sir, I went in for general repairs.

Q. You conceived that it was necessary to have your ship repaired before you went further on your voyage?

A. Yes, sir.

Q. Why was that?

A. I did not know what sort of weather I might encounter coming across the Pacific.

Q. Did you expect to encounter worse weather coming across the Pacific than you encountered running into Sydney? A. I might have done.

Q. It was not reasonably to be expected?

A. It was not unreasonable to expect it.

Q. Ordinarily you would not have expected any worse weather than you had?

A. No, sir, not ordinarily.

Q. Still, you thought it was necessary to repair?

A. Yes, sir.

Q. What did you do to your decks at Sydney?

A. Had the beams put back into their place, and the decks calked.

(Deposition of Robert Johnston.)

Q. Any other repairs?

A. I mentioned the repairs in Sydney.

Q. Have you mentioned them all?

A. Most of them. All the particular repairs.

Q. At Antwerp was the vessel laden under the superintendence of a stevedore? A. Yes, sir.

Q. Who was the stevedore?

A. I could not tell you his name; I do not remember it.

Q. You do not remember it? A. No, sir.

Q. Do you know the name of the firm?

A. August Bulcke & Co's. stevedores.

Q. Who were they? What were they to the ship?

A. They are the agents for Messrs. Spreckels.

Q. Did they attend to the loading of the ship?

A. Their stevedore was the man who stowed the ship.

Q. How do you know they are the agents of Spreckels?

A. They are the shippers for Spreckels.

Q. Have you any information upon that subject, or are you only assuming it? You have no direct information, have you? A. No, sir, not upon that point.

Redirect Examination.

Mr. PAGE.—Q. After beginning to make your easterly course, were you in a condition to be able to do anything towards improving your decks?

A. No, sir, not as I had anticipated. I anticipated

(Deposition of Robert Johnston.)

we would have better weather as we run along, and that I would be enabled to do something to the decks; but we had exceptionally severe weather for that time of the year; the hardest weather that ever I experienced running down east to Australia, and I have run down there for the last twenty years or twenty-five years.

Q. What is the proportion of wheat that you are carrying now in your lower hold and that of your between-decks?

Mr. FRANK.—I object to the question as immaterial.

A. We have no between-decks in the ship now.

Mr. PAGE.—Q. Were the stevedores at Antwerp employed by you? A. Yes, sir.

Q. And who selected them?

A. They were selected at the suggestion of the charterer's agent.

Q. Who were the ship's charterers?

A. McFarland and McCrindle.

Q. Under the usual provisions of the charter-party?

A. Under the usual provisions of the charter-party.

Q. They selected these people, and you accepted them as being proper people? A. Yes, sir.

Q. But the stowage was done under your superintendence? A. Yes, sir.

Q. Also provided by the charter-party?

A. Yes, sir.

[Endorsed]: Filed Jul. 18, 1900. Geo. E. Morse, Clerk. By John Fouga, Deputy Clerk.

Deposition of ALPHONSE DAVID MARIE ABTS, taken on behalf of the claimant, on commission, before Geo. F. Lincoln, Consul-General Commissioner, at Antwerp, Belgium, on July 24, 1902.

Direct Interrogatories.

1. Please state your name, age, residence and occupation.

A. Alphonse Abts; age, 52; Antwerp; stevedore.

2. If you say in answer to the foregoing interrogatory that you are a stevedore, state how long you have been in such business and at what city, and the name of your firm, if you have a firm.

A. Have been a stevedore since 1870 at Antwerp. My present firm name is Abts & Co.

3. Please state whether your experience as a stevedore has included the loading of ships for California. If yea, for how long a time? .

A. Yes, since 1898.

4. Do you remember having had the loading of the British Ship "Musselcrag" at Antwerp about June or July, 1899? A. Yes.

5. If yea, please state what class of cargo she was loaded.

A. Cement and general cargo—not much general cargo.

6. What knowledge had you of the method in which she was loaded, that is, as to the character and quantity of cargo which was placed in different parts of the vessel? A. I do not know.

(Deposition of Alphonse David Marie Abts.)

7. Was such loading done under the general superintendence of any person; if so, under whose superintendence was it done?

A. Under that of the captain and chief officer.

8. Did you personally have anything to do with the loading or supervision of the loading of the "Musselcrag"?

A. I did not personally direct the detail of the work but looked after the stowage, blocking up the cargo and dunnaging.

9. If you know the way in which the ship was loaded, please state whether or not in your opinion she was properly loaded for the voyage from Antwerp to California.

A. As far as I can recollect after three years I think this ship was properly loaded and in the usual conditions.

10. In your opinion, as she was loaded, was the ship seaworthy or unseaworthy?

A. In my opinion, yes.

Cross-interrogatories.

1. If, in your answer to the sixth interrogatory, you shall state that you know the method in which said vessel was loaded, as relates to the character and quantity of cargo which was placed in the different parts of the vessel, give the number of tons of cargo, and kind of cargo that was stowed in the lower hold of said ves-

(Deposition of Alphonse David Marie Abts.)

sel, and with which she departed upon her voyage from Antwerp to San Francisco, in July, 1899.

A. I do not know.

2. Give the number of tons of cargo, and the nature of the cargo that was stowed in the between-decks of said vessel, and with which she departed upon her voyage from Antwerp to the port of San Francisco in the month of July, 1899?

A. It is impossible to say.

3. State whether or not you have any stowage plan of said vessel showing the number of tons of cargo placed in the lower hold, and the number of tons of cargo placed in the between-decks, and their position. If you have such stowage plan, produce the same and have it attached to this deposition, and marked Exhibit "A."

A. I have no plan, but a copy of a plan was communicated to me four or five weeks ago by Messrs. Auguste Bulcke & Co.

4. If you shall produce such stowage plan, state whether or not it truly and accurately sets forth the number of barrels of cement and other cargo contained in the lower hold of said vessel on the 17th day of July, 1899, for the voyage from Antwerp to San Francisco, and state whether or not such stowage plan accurately sets forth the number of barrels of cement and the number of bags of sulphur, and number of cases of other cargo contained in the between-decks of said vessel at said time and for the said voyage.

(Deposition of Alphonse David Marie Abts.)

A. After a lapse of three years it is impossible for me to say if this plan is correct or not.

5. State whether or not said vessel left said port of Antwerp for a voyage to the port of San Francisco with the cargo named in said stowage plan and stowed as in said stowage plan indicated?

A. I do not know.

6. If you shall say that you did not personally have anything to do with the loading or supervision of the loading of the said vessel, then state by what means you secured the information regarding the manner in which she was loaded, and whether or not it is from any records or data that you have in your office and regularly kept by you in the course of your business.

A. By personal observation in accordance with my reply to the direct interrogatory.

7. Did you ever see the "Musselcrag" before?

A. No.

8. Do you know whether or not she is naturally a stiff or cranky ship?

A. I do not know, I have never been to sea in her.

ALPHONSE ABTS.

Deposition of LEOPOLD HAAZEN, taken on behalf of libelant, on commission, before Geo. F. Lincoln, Consul-General Commissioner, at Antwerp, Belgium, on April 24, 1902.

(Deposition of Leopold Haazen.)

Direct Interrogatories.

1. State your name, age and occupation.

A. Leopold Haazen; 32 years of age; laborer.

2. Were you foreman stevedore for Alph. Abts & Sons at Antwerp in the month of July, 1899?

A. No.

3. If, in answer to the last interrogatory, you shall say that you were such foreman stevedore, state whether or not during the month of July, 1899, you acted as such foreman stevedore in the loading of the bark "Musselcrag" at Antwerp?

A. I was employed as a laborer.

4. If, in answer to the last interrogatory, you shall say that you did act as such foreman stevedore in the loading of the bark "Musselcrag" in the month of July, 1899, give the number of tons of cargo and kind of cargo that was stowed in the lower hold of said vessel when when she departed from Antwerp in July, 1899, upon her voyage to the port of San Francisco.

A. As a workman I had no knowledge of it and had no means of information.

5. State how many tons of cargo, and the nature of the cargo, that was stowed in the between-decks of said vessel upon her voyage from Antwerp to the port of San Francisco, beginning in July, 1899.

A. It ws cement, but I do not know the quantity.

6. State whether or not you have any stowage plan of said vessel showing the number of tons of cargo placed in the lower hold, and the number of tons placed

(Deposition of Leopold Haazen.)

in the between-decks, and their position. If you have such stowage plan, produce the same, and have it attached to this deposition marked Exhibit "A."

A. I have no plan.

7. If you shall produce such stowage plan, state whether or not it truly and accurately sets forth the number of barrels of cement and other cargo placed in the lower hold of said vessel on the 17th day of July, 1899, for the voyage from Antwerp to San Francisco, and state whether or not such stowage plan accurately sets forth the number of barrels of cement and the number of bags of sulphur, and the number of cases of other cargo placed in the between-decks of said vessel at the said time and for the said voyage.

A. I have no such plan.

8. State whether or not said vessel left the port of Antwerp for a voyage to the port of San Francisco with the cargo named in said stowage plan, and stowed as in said plan indicated. (Nathan H. Frank, Attorney for Libelants.)

A. I do not know.

Cross-interrogatories.

1. How long have you been foreman stevedore in your present or any other employ?

A. I never was foreman with anyone.

2. In your experience as foreman have you been engaged in loading ships with cargoes of the class to which

(Deposition of Leopold Haazen.)

that of the "Musselerag" belonged? If yea, to what extent have you been so engaged?

A. I never was foreman.

3. If, in answer to the fourth direct interrogatory you shall have given the number of tons and the nature of the cargo therein asked about, state whether you gave such answer from your independent recollection of the facts or from some plan or memorandum presented to you? A. I know nothing of it.

4. If, from some memorandum or plan, state what that plan or memorandum is. State further whether the plan or memorandum was made by yourself. State further when it was made. A. I don't know.

5. If you shall have stated that the memorandum or plan was made by yourself, state whether the same was made at the time the ship was stowed, or at a later period. A. I never made a plan.

6. State whether such memorandum or plan was made from your personal observation entirely, or in whole or in part from reports made to you by other persons. A. I made no plan.

7. State whether you personally counted the barrels which are stated on such plan to have been placed in the different parts of the "Musselerag's" hold and between-decks. A. I did not count them.

8. Has it been your custom as foreman stevedore to make a plan of the stowage of every ship which you loaded for San Francisco at the time the cargo was being stowed or immediately after the cargo was stowed?

(Deposition of Leopold Haazen.)

A. I was not foreman.

9. If it has been your custom so to do, has it also been your custom to insert the number of barrels or cases stowed in each part of the ship which holds cargo?

A. No.

10. How often, previous to the loading of the "Musselcrag," had you made a plan of the stowage, giving the quantity of cargo stowed at each of the different points? Give the names of the ships.

A. I made no such plan.

11. Was it not your duty as foreman stevedore of the ship to exercise your best judgment to make good stowage of the cargo of the "Musselcrag" for the voyage to San Francisco?

A. As far as I know it was well stowed, but I was not foreman.

12. Was not the stowage of the ship in your actual charge as foreman stevedore? A. No.

13. Was the cargo of the "Musselcrag" stowed with regard to division of weights in the lower hold and between-decks, in the manner customary with ships loading at Antwerp, sailing for San Francisco?

A. I do not know.

14. Was not the cargo of the "Musselcrag" properly stowed in your opinion with regard to the division of weight between the lower hold and between-decks?

A. As to weights I can say nothing, but the stowage was well done.

(Deposition of Leopold Haazen.)

15. Did you at any time make any report to the master of the "Musselcrag" that there was too much cargo in the lower hold and too little in the between-decks? A. I did not.

16. If you made a plan of the stowage, did you furnish the master of the "Musselcrag" with a copy of it? A. I made no plan.

17. If you made such plan, did you at any time submit the plan for his inspection? A. I made none.

18. How much empty space was left in the lower hold when the "Musselcrag" was laden at Antwerp and in what parts of the ship were such spaces?

A. It is difficult to say after three years.

19. How much empty space was left in the between-decks of the "Musselcrag" and in what parts of the ship were such spaces?

A. It is difficult to say after a lapse of three years.

Redirect Interrogatories.

1. If, in answer to the fourth cross-interrogatory you shall state that the said plan or memorandum therein inquired of, was not made by yourself, state whether or not it was made under your direction and supervision.

A. No.

2. State whether or not you furnished to the person who did make said plan or memorandum, the number of tons and kinds of cargo stowed in the lower hold, and the number of tons and kinds of cargo stowed in the between-lecks. A. No.

(Deposition of Leopold Haazen.)

3. State whether or not at the time of stowing the cargo of said vessel you were advised or knew that the said ship "Musselcrag" was a stiff ship.

A. I do not know.

4. State, if you remember, where the master of said ship was during the lading of said cargo.

A. The captain came on board every day.

5. State what, if any, opportunity the master of said vessel had during the lading of said cargo to ascertain the number of tons in her between-decks and the number of tons in her lower hold.

A. The captain had the opportunity by referring to the checker's notes.

LEOPOLD HAAZEN.

[Endorsed]: Published and filed by order of court this 2d July, 1902. Geo. E. Morse, Clerk. By John Fouga, Deputy Clerk.

JOHN BURKE, called for the libelant, in rebuttal, sworn.

Mr. FRANK.—Q. Mr. Burke, what is your business?

A. Foreman stevedore.

Q. How long have you been engaged in that business?

A. Eighteen years.

Q. In whose employ were you during that time?

A. Stewart Menzies & Company's.

Q. Do you remember the ship "Musselcrag" when she came into this harbor in June or July, 1900, with a damaged cargo of cement?

A. Yes, sir.

(Deposition of John Burke.)

Q. Were you engaged at that time in the discharge of that cargo? A. Yes, sir.

Q. What did her cargo consist of?

A. It consisted of 100 tons of general merchandise, and the rest cement.

Q. Do you remember how that cargo of cement was stowed in the lower hold with reference to whether it was stowed bilge and cuntline or raised?

A. It was set bilge and cuntline, raised on the bottom, I suppose about a foot from the bottom of the ship.

Q. I mean so far as the cargo itself is concerned, was it set solid?

A. A solid bulk of cement; from the between-decks down there were a few boards scattered along the main hatch, and barrels were set on top of them, but from there aft to both ends of the ship, there was nothing but cement, and it was set bilge and cuntline.

Q. Did those boards have any tendency to raise the heads of the barrels so as to increase the liveliness of the ship?

A. No, sir, I don't think so. The fourth tier below the between-decks was where the boards were.

Q. What was the size of the boards?

A. Old pieces of lining boards that they line ships with, perhaps 1 by 10 or 1 by 12, and perhaps 20 feet long.

Q. Were those boards of sufficient strength to have ordinarily sustained the weight of three or four tiers of cement? A. I don't hardly think so.

(Deposition of John Burke.)

Q. Well, do you know?

A. I think it is too much weight for an inch board to stand four tiers of cement.

Q. What is the weight of a barrel of cement?

A. Four hundred pounds, on an average.

Q. So four tiers of it would be about 1600 pounds?

A. Yes, sir.

Q. From what you saw of that cargo, could you tell whether or not it had been originally tiered up or raised from the sixth tier?

A. No, sir, nothing raised that I saw. I think those few boards were on top of the sixth tier.

Q. What would that indicate to you? Could you tell from your experience whether it had been originally raised, or whether it had been set solid?

A. I could not tell whether they set it that way or threw those boards there. They were not all the way from the hatch that way; they were just in the body of the ship in the main hatch.

Q. None of those boards were found anywhere except around the main hatch?

A. Around the main hatch; that is all I could find.

Q. And how were the barrels stowed away there? Were they stowed as if they had been raised, or bilge and cuntline?

A. They were set on those boards, and over those boards they were set bilge and cuntline again above.

Q. What was the area of the main hatch compared with the spread of the cargo?

(Deposition of John Burke.)

A. About the size of the hatch, you mean?

Q. Yes.

A. I could not exactly say. It might have been four beams in length, and it might have been about 12 or 14 feet wide, and it might have been 16 feet long in the main hatch.

Q. And it was stowed in what points?

A. Stowed from the bulkhead forward to the foremast two tier high, and from the foremast half barrel shingle to the between-decks shingle from behind the mizzenmast to the between-decks below the mizzenmast in the lower hold. Nothing outside of cement but a few crates of bottles and barrels of pulverized sulphur in the lower hold among the cement.

Q. And in that cargo there was no indication of any raising of the cargo except in this square around the main hatch?

A. That is all that I know.

Q. If it had been there, would you have seen it?

A. I would, because I was looking down there all the time. I blowed a whistle for the engineer to go ahead; I have to look down to see that the load is slung right.

Q. Do you remember anything about whether the ship was a naturally stiff ship or not?

Mr. PAGE.—If your Honor please, I do not know how the witness would be capable of testifying to that.

Mr. FRANK.—We will find out whether he is capable.

Mr. PAGE.—Ask him what his capacity is and what his opportunities are to know.

(Deposition of John Burke.)

Mr. FRANK.—Q. Did you see the ship go from here to Port Costa? A. No, sir, I did not see her going.

Q. Did you see her start? A. No, sir.

Q. Do you know whether or not she had any ballast in going from here to Port Costa?

A. Well, I did not put it in. I took all her cargo out of her before I left. The last thing I took out of the ship was a load of firewood the captain gave me. That was the last thing that came out of the ship; some dunnage wood.

Q. She was cleaned out when you left her?

A. Yes, sir, cleaned out, outside of the dunnage wood, old wood underneath the cargo.

Cross-examination.

Mr. PAGE.—Q. What is your place on deck when you superintend the discharge of the ship?

A. Hatch tender; I blow the whistle for the engineer to go ahead.

Q. Do your duties keep you all the time at that spot?

A. No, sir.

Q. Do you go down below? A. Yes, sir.

Q. What do you do down below?

A. Sometimes we have men not accustomed to work, and we show them what to do in the way of laying planks, and so on.

Q. Who attends to the engineer while you are down there?

A. I have a man, or else nobody attends to him.

(Deposition of John Burke.)

Q. Do you remember that you were down on that occasion to teach new hands?

A. Yes, sir, I was down several times.

Q. Do you remember you were down several times for that purpose, to teach new hands?

A. Not for that necessarily; sometimes you have to go down to see that the men are not playing you, that they are doing all the work.

Q. How long ago was it that the cargo was discharged from the "Musselcrag"?

A. I cannot tell you how long ago it was.

Q. Was it over four years ago?

A. It is two years, anyway.

Q. And during that time you have been discharging cargoes from ships?

A. Yes, sir.

Q. Cement cargoes?

A. Several times.

Q. Do you remember what was in each individual ship you have discharged during the last five years?

A. Not positively, no.

Q. When was your attention first called to the "Musselcrag" so as to note that there was anything different in her, or did you notice anything different?

A. Some ships do not have a general cargo; sometimes ships only have light stuff on board.

Q. But, so far as this cargo was concerned, it was the same as all ships that you have noticed that came with cargoes of cement?

A. Yes, sir, bilge and cuntline.

(Deposition of John Burke.)

Redirect Examination.

Mr. FRANK.—Q. Do you know anything about the different stability of ships? In loading ships, do some ships take cargo laden away down, and some another way, in order to make them stiff or lively?

A. Some ships require a good deal more weight in the lower hold than others. In putting in cargoes, you regulate the cargo in a certain way. The master stevedore generally tells us how much to put there, how much to go here and there, and so on.

Q. Why is it you remember so particularly concerning the "Musselcrag"?

A. Well, it happened we did not work very long on that ship; she was a two-hour-a-day shift. We put out more cement than ever was put out in San Francisco. There was a time when we put out twelve hundred and twenty-odd barrels from half past 7 to half past 9, and the whole city front was around to see the work done. The average work in most ships is 300 out of the lower hold, and 400 between-decks; but out of the "Musselcrag" I put between 500 and 600 out of between-decks and 400 or 450 out of the lower hold.

Q. Was anything said to you at that time about the danger of that cargo, or anything asked you concerning the manner in which the cargo was stowed?

A. No, sir.

Q. Do you not remember coming up to my office?

A. Oh, yes, once I was to your office with Mr. Menzies.

(Deposition of John Burke.)

Q. Have you been spoken to about it since?

A. No, sir, outside of Mr. Wilson speaking the other day for me to come up and see you.

Q. At the time you came to my office, did you make a statement of these conditions, of the condition of that cargo?

Mr. PAGE.—We object to that, your Honor, as immaterial.

Mr. FRANK.—I do not propose to call for the statement. I simply want to show there was something to fix this particular cargo in his mind.

Mr. PAGE.—He has already said so.

Mr. FRANK.—Q. Do you remember that?

A. Yes, I remember going to your office.

Recross-examination.

Mr. PAGE.—Q. You said that the master stevedore was the man who determined those things. In the case when a ship is stowed in a foreign port, the master stevedore determines the proper stowage there?

A. I do not know anything about any other port. This is the only port I ever worked in. I was born here.

Q. In this port, the question is always determined by the master stevedore who is loading the ship?

A. It has been with the people I have been working for.

F. G. WILSON, called for the libelant, in rebuttal, sworn.

Mr. FRANK.—Q. What is your business?

A. Stevedore.

Q. How long have you been in that business?

A. In San Francisco, do you mean?

Q. Yes, sir.

A. Twenty-one years.

Q. What, if any, firm have you been connected with during that time?

A. Stewart Menzies & Company.

Q. Were you connected with that firm at the time that the "Musselcrag" was discharged in this harbor, in June or July, 1900?

A. Yes, sir.

Q. Do you remember the ship?

A. Yes, sir; I was aboard of her lots of times.

Q. You had to do with her before?

A. We loaded her before; we discharged her ballast and loaded her before when she came from Shanghai a couple of years previously.

Q. Do you know what her build is in reference to being a beamy and stiff ship or a cranky ship?

A. She is a stiff vessel; a very stiff ship.

Q. From your experience in stevedoring, what would you say in reference to a vessel like the "Musselcrag," laden with cement, and carrying 2,350 tons of cement in her lower hold, and 928 in the between-decks—what would you say in reference to the seaworthiness of a vessel of the character of the "Musselcrag" with such a cargo?

(Deposition of F. G. Wilson.)

Mr. PAGE.—I object to the question on the ground that the witness is not shown to have any knowledge regarding the stowage of ships with cement. If there is any difference between cement and any other cargo, the witness is not shown to be a man who has been accustomed to load ships with cement, nor is he a man who is shown to have any connection with the carrying of such a cargo so as to make him competent to say that a particular ship will carry cement in a particular way, and another ship will carry a different amount of cement in another way.

The COURT.—Let us hear the answer, and you can draw that out on cross-examination.

A. From my experience as a sailor and an officer of a ship—I have never had anything to do with anything but ships for the past 33 or 34 years—I should say that she got about 150 or 200 tons more cement in the lower hold than she ought to have.

Mr. FRANK.—Q. What would be the result on the action of the vessel laden too heavily in the lower hold, as you have indicated?

A. In heavy weather, or head-reaching, she would roll to the windward very heavily and shake herself up.

Q. What do you mean by “shaking herself up”?

A. I mean she is liable to carry away her spars and her rigging, and furthermore she is bound to strain the decks more or less. She comes to the windward with a jerk.

(Deposition of F. G. Wilson.)

Q. You say she comes to the windward with a jerk?

A. Yes, sir.

Q. That is, she rights herself too quickly?

A. Rights herself too quickly, owing to the center of gravity being below water.

Q. And that has a tendency to open up her decks and to strain the vessel?

A. It has a tendency to do damage to a vessel, and especially in an iron vessel.

Q. Why more particularly in an iron vessel?

A. Because these modern steel ships are built different from the old-time iron ships.

Q. In what respect?

A. Inasmuch as they carry a bigger percentage over their registered tonnage, an iron ship weighs heavier and a steel ship weighs less.

Q. Do you remember what this vessel carried over her registered tonnage?

A. She carried somewhere in the neighborhood of 80%, if I recollect right. She is 1871 tons register, and she carried 3,360 tons of weight the last time we loaded her, and I think she carried 3,355 tons the time we loaded her before. But, of course, wheat is a different cargo altogether from cement.

Q. In what respect?

A. The weight is more distributed. In loading her with wheat, we might put two-thirds of the cargo in the lower hold, and the balance in between-decks; or one-third of the cargo in between-decks, and two-thirds

(Deposition of F. G. Wilson.)

in the lower hold, and it would be shingled down at both ends in the lower hold. With a cargo of cement that lies low in a vessel, there should be more dead weight between-decks so that the vessel would be easier at sea.

Q. That is, cement is more compact and lies dead at the bottom of the ship?

A. Yes, sir; lies closer together.

Q. Mr. Wilson, you stated that you had been connected with Stewart Menzies & Co. for a great number of years—I have forgotten how many years you said.

A. Twenty-one years.

Q. During that time, do you know what percentage of British vessels coming to the port of San Francisco were loaded and discharged by that firm?

A. Probably 75%.

Cross-examination.

Mr. PAGE.—Q. Were you ever a shipbuilder, Mr. Wilson? A. No, sir.

Q. Were you ever a master of a ship?

A. A small vessel, yes, sir.

Q. What kind of a vessel?

A. Master of a small bark for a short time.

Q. For how long?

A. About two and one-half months.

Q. Before that what did you do?

A. I was a Yokohama pilot for about three years.

Q. And before that?

(Deposition of F. G. Wilson.)

A. Mate and second mate; second mate on the coast here.

Q. What do you call the center of gravity in a ship?

A. I mean when there is too much dead weight in the lower hold, and then again the cement lies low between decks—that ship's between-decks, would be probably $7\frac{1}{2}$ or 8 feet, and if you take that cement and put it three or four tier, it lies very low.

Q. Have you ever loaded cement yourself on board ship?

A. No, sir, I have not loaded cement, but I have loaded lime here when I was on a ship.

Q. What kind of a ship did you load lime upon?

A. A wooden vessel.

Q. A small vessel?

A. Yes, sir, a vessel that would carry about 750 tons.

Q. You never have had any experience in the stevedoring business with reference to the loading of cement?

A. No, sir, but I have in the discharging of it.

Q. Where does most of the cement come from?

A. In years gone by, it used to come from England, and now it comes from Hamburg and Antwerp.

Q. Very large quantities come in every ship that comes from Antwerp? A. Yes, sir.

Q. You said a moment ago that the center of gravity would be below the water. Do you understand that there is a center of gravity which affects the stability of a ship? A. It would make her too stiff.

(Deposition of F. G. Wilson.)

Q. Do you understand that there is such a thing as the center of gravity?

A. No, sir. I am only a sailor; I am not college bred. I mean to say that here was too much cement in the lower hold, and not enough in between-decks, undoubtedly the vessel would roll to the windward quicker and be too stiff.

Q. What would be the first effect that would be shown in a ship if she was loaded too deep and was too stiff—would it not carry away her upper spars? Is not that the weakest point of her, if she is too stiff and rolls too heavily? Is not that the danger?

A. That is the danger in many cases, of ships losing their spars.

Q. That is the weak spot?

A. Yes, sir, that is the weak spot. And, in addition, of course, it is liable, with these iron ships, or steel ships rather, that they build now, they are liable to strain very heavily.

Q. All ships are liable to strain if they roll, are they not?

A. Yes, sir, but a steel ship is more liable to damage herself than a wooden ship.

Q. If she was rolled in a heavy sea?

A. Yes, sir.

Q. But the first point at which a vessel that was so stiff as to cause an extraordinary amount of rolling would feel the effect, would be in her spars. That is her natural spot, the weak spot in the ship, in that case?

(Deposition of F. G. Wilson.)

A. Well, that is a matter that you have to deliberate on.

Q. Do you not know anything about ships?

A. I know this much: Of course, that she will feel it in her spars.

Q. That is the place she will feel it first, is it not?

A. The spars in an iron ship, where they are practically all iron, there is more or less connection with the bulwarks; there is no give to anything like there would be in a wooden ship.

Q. And the result is that the spars are in danger all the time?

A. The spars are in danger all the time, and so are the bulwarks.

Q. And that is the point that is likely to be struck first? A. Yes, sir.

Q. Did you load this ship on the outside voyage, after she arrived here?

A. Do you mean did we load her going home?

Q. Yes? A. We loaded her twice.

Q. As a matter of fact, did she not carry a heavier cargo of wheat than was loaded upon her at Antwerp of cement? A. I think just about the same.

Q. It was at least the same amount in weight, was it not? A. About the same amount.

Q. You do not know that it was any more?

A. I do not suppose there was over 10 or 15 tons difference, unless what the ship jettisoned on the other

(Deposition of F. G. Wilson.)

side. Of course, I do not know anything about that. My books will show what she discharged here.

Q. You have been assuming all the time that the figures Mr. Frank gave you were correct—he gave you 2350 tons and 928 tons of cement.

Mr. FRANK.—No, he has not been assuming anything. I have given him a hypothetical question.

The WITNESS.—How much would that make all together?

Mr. PAGE.—Three thousand two hundred and seventy-eight tons, according to those figures that Mr. Frank gave you.

Q. Do you remember whether or not she carried a heavier cargo of wheat than 3,278 tons on her return?

A. We were paid for loading 3,360 tons and 3,355 tons.

Q. So she carried, according to those figures, they being correct, more going home than she had been loaded with?

A. Yes, sir, but it is a different kind of cargo. It is distributed all over the ship; whereas cement is not.

Redirect Examination.

Mr. FRANK.—Q. Mr. Wilson, in the first place, a high-sparred vessel, or a vessel with high masts, and a vessel with low masts would be differently affected by this falling and rolling, would it not?

(Deposition of F. G. Wilson.)

A. You mean the ship that carries royals and sky-sails, and a bald-headed vessel?

Q. Yes.

A. Well, I have never been on a bald-headed vessel, but I usually saw as a sailor that the bald-headed vessels that will have from 70 to 75 feet double topgallant yards will be more liable to damage herself like the "Musselcrag" was.

Q. You mean by "a bald-headed vessel," one without royals? A. Yes, sir.

Q. I am speaking now of the damage to the spars, first. The higher the spars, the more likely the spars are to receive the first damage? A. Yes, sir.

Q. How was the "Musselcrag" sparred? Was she a bald-headed vessel?

A. Yes, sir; bald-headed; nothing above her topgallant yard.

Q. In reference to the weight of a cargo that the vessel carries, that is, the number of tons of her total cargo, that is not a question that affects her rolling, is it? The relative number of tons that a vessel carries in one cargo, or another is not what affects her rolling, but it is the distribution of the cargo?

A. It is the distribution of the weight in the ship.

Q. That is, two cargoes of equal weight might be carried so distributed, the one that would cause her to be very stiff and jerk herself to pieces, and the other one being loaded higher up would make her lively and easy?

(Deposition of F. G. Wilson.)

A. I have loaded ships here that would carry three thousand odd tons, the same as that ship—and 3,500 tons—and there would be 3,000 tons in the lower hold, and only 500 in between decks, whereas a ship of the “Musselcrag” class would require more in between decks.

Q. Is there any difference with reference to cement or other cargoes, in the relative weight that the vessel should carry above her between-decks from that which she has below. Does it make any difference what kind of cargo a ship has, whether it be cement or something else, in regard to the number of tons that should be above between-decks and those in the lower hold?

A. Most certainly. For instance, if you load a cargo of nitre, the nitre can come within 2 feet or 2½ feet of the ship’s side, and it is built right up in her.

Q. That is because it is light?

A. It is to have the ship in proper stability.

Q. The weight has to be divided in a certain way?

A. Yes, sir.

Q. And it does not make any difference whether it is cement or not, that same relative division of weight will have to appear in the whole of the vessel?

A. Yes, sir; various cargoes have various ways of being stowed.

Q. That is, where they are compact and heavy—

A. (Interrupting.) They have to be built up accordingly.

Q. But, so far as the weight that they carry is con-

(Deposition of F. G. Wilson.)

cerned, it is immaterial whether it is a heavy weight, that is, in a small compass, or whether there is a light weight in a large compass; is that the idea?

A. For instance, you take wheat: That goes 46 cubic feet to the ton; you distribute it and shingle it up in both ends of the ship, and you have the lining of the ship six inches on the floor and nine inches on the turn of the bilge. Take a ship loading a full cargo of barley, with the permission of the surveyors they would lower down the dunnage, the lining, to two inches, so she would carry more cargo in her lower hold.

Q. That is because barley is lighter, and you want to get it lower down in the ship?

A. Yes, sir.

Q. You were asked whether all ships did not roll in a heavy sea.

Mr. PAGE.—I don't think I asked that question. I presume all ships do roll in a heavy sea.

Mr. FRANK.—Yes, I presume they do; all ships do roll in the sea, but the question of the stability of vessels has to do with their righting power, whether they right quickly or come up slowly.

A. Different ships act differently at sea. I have been in American wooden ships that, with the weight properly distributed, would go along and would not damage themselves at all; whereas, another ship would, in heavy weather, when headreaching, tear herself all to pieces.

Q. With the weights distributed properly?

(Deposition of F. G. Wilson.)

A. Even with the weight properly distributed; that is, to a certain extent, of course; jerking to the windward.

Recross-examination.

Mr. PAGE.—Q. All ships differ, to a greater or less extent, with reference to being cranky or with reference to being stiff? A. Yes, sir; all ships do.

Q. And the matter of loading a ship is generally left to the supervision of the captain for that reason, is it not; he is supposed to have the best judgment on that subject?

A. It all depends on the nature of the cargo. There are old stereotyped rules—

Q. (Interrupting.) There are general rules, I understand.

A. These rules are changing. When I went to sea 35 years ago, they used to stow wine or tallow or a wheat cargo in a ship's forehold. Now, if I was loading a cargo, I would put wine in between decks, simply because the modern ship is so large, and they carry such a heavy percentage over the registered tonnage, and according to the rules of stowing wine you are only allowed to have so many tiers, and if you put weight on top of that in the lower hold—take a ship with 17½ feet in the lower hold, and you put six tiers of wine there, you have to put something on top of it. If you put it between-decks, and stow it bilge and cuntline, and then

(Deposition of F. G. Wilson.)

block it off with something else, there is no danger of any damage.

Q. That is not an answer to my question. You say different vessels vary according to size, and so forth; some are a little stiff and some are more tender. Who is the man to whose judgment it is generally left to determine how the ship will be loaded, so the line of tenderness will not be crossed or the line of stiffness will not be crossed? Is that the master or the master stevedore?

A. In all cases, the captain of the ship is supposed to supervise the loading of his ship.

Q. He is the man, who knows her condition from previous experience generally.

A. Generally speaking; but, of course, there are lots of ships we have loaded here, that the master would leave the matter entirely to the stevedore.

Q. The stevedore is a man who understands his business, as a rule? A. Yes, sir.

Q. And he attends to it?

A. There are lots of ships owned here that the captains are not here when the ships are loaded, and they have an overlooker, and the overlooker probably leaves it to the stevedore.

Q. But it is a matter of nice judgment whether you are crossing that line on one side or crossing it on the other in different ships?

A. It is a matter of practical knowledge of the cubic contents of the vessel.

(A recess was here taken until 2 o'clock P. M.)

Afternoon Session.

SAMUEL H. QUAYLE, called for the libelant, in rebuttal, sworn.

Mr. FRANK.—Q. What is your business?

A. Master mariner.

Q. How long have you been a master mariner?

A. Since 1884; 18 years.

Q. What is your present employment?

A. Captain of a sailing ship.

Q. What vessel? A. "Ellisland."

Q. What class of a vessel is that?

A. An iron ship.

Q. A British vessel? A. A British vessel.

Q. Have you made frequent trips around the Horn?

A. Yes, sir; some fifteen or sixteen times.

Q. Have you ever carried cargoes of cement?

A. Yes, sir.

Q. Do you know the ship "Musselcrag"?

A. I do not know it particularly, but I know her class of ship.

Q. It has been testified here by the master that she is a beamy ship and a naturally stiff ship, and that she had 2,350 tons of cement in her lower hold and 928 tons in her between-decks, on a voyage from Antwerp to San Francisco around the Horn, and that the vessel met with bad weather and rolled and strained violently. Now, with a vessel of that class and a cargo such as I have described to you, what would you say in regard to the vessel being seaworthy or not?

(Deposition of Samuel H. Quayle.)

A. She was too stiffly laden; it would make her labor-some.

Q. About what quantity do you think she should have had raised from her hold into her between-decks?

A. To load the ship with cement, she should have had from 62½ to 65% in her lower hold, and as the cargo was given to me, I figured it out that she had 71½% in her lower hold.

Q. In the stowing of the cargo in the lower hold, how should it be stowed—compact, or should it be raised so as to make spaces, interstices, between the barrels?

A. It is hardly possible to load by making the interstices between the barrels, but the cargo is raised by not putting it so far forward or so far aft, and brought up as high as it possibly can be in the middle of the ship.

Q. What would have been your idea, if the cargo had been brought up in the middle of the ship, only leaving one tier between that and the between-deck beams?

A. Well, it is the usual way of stowing the cement, but then we allow for that by putting less in the lower hold. It is according to the class of ship and according to her requirements for stowing, and with the style of ship of the "Musselcrag's" class, I should say that she should have no more than 64% in the lower hold.

Q. What would be the effect, Captain, of stowing too much dead cargo in the lower hold?

A. It would make the ship labor-some in a sea way, and strain herself.

(Deposition of Samuel H. Quayle.)

Q. In straining, what effect would that have upon the decks?

A. Opening the seams and making a leak.

Q. I show you now what purports to be the ship's log on the voyage here in question, and ask you whether you have ever seen it (handing)?

A. Yes, sir, I have seen this log-book.

Q. Did you make a careful examination of it with reference to this question?

A. Yes, sir, I went over it.

Q. What, if anything, can you say with reference to the weather described in that log-book as having been experienced off the Horn compared with the usual weather to be expected at that place?

A. I do not find anything in the log-book showing that the weather was anything unusual from what we experience down off the Horn. The Horn is a place that we have to provide against for extreme weather, and, in my judgment, looking over this log-book, I do not think there is anything in the log-book any more than I had there myself.

Q. Is there anything in the weather as described in that log-book that would warrant the condition of affairs which is described as having arisen on board of that vessel, providing she had been properly stowed?

Mr. PAGE.—That question calls for the opinion of the witness on matters that he cannot possibly know.

Mr. FRANK.—Why not?

(Deposition of Samuel H. Quayle.)

Mr. PAGE.—He is asked to look at a log-book, and then asked whether the condition of the weather would account for injuries to the ship of a certain kind or to a certain extent. It does not follow that the log-book shows the precise condition of things as they were. It is only the mate's idea of how the trip should be put down.

Mr. FRANK.—It is more than the mate's idea. The captain has testified that it is his idea, and it was put down under his supervision and dictated by him. It is a confession by the captain of what was going on.

The COURT.—Let the question be answered.

A. In my opinion, the weather as described in this log-book, if the ship had been stowed with less cargo in her lower hold, the ship would not have come to so much damage as she did get. I do not put that forth as opinion but what a ship might be damaged off the Horn, but, as far as I can see in this log-book, she had no unusual weather off the Horn.

Mr. FRANK.—Q. Is there anything in the log-book that would indicate to your mind that the vessel was unusually stiff, from the actions of the vessel, as described in the log-book?

A. Yes, by the entries in this log-book, even before she gets to the Horn, in what we call moderate latitudes, she is described as laborsome and rolling heavy under normal conditions.

(Deposition of Samuel H. Quayle.)

Q. And what would that indicate to your mind, as an experienced mariner, regarding her lading?

A. The ship was too stiffly laden. By the entries in the log-book, the master himself most likely thought so, as he was lifting some cargo out of the lower hold into between-decks, and trying to rectify some of its laborsomeness.

Q. You find an entry there, do you, where the master raised the cargo to ease the straining of the ship?

A. Yes, sir.

Q. Will you turn to that, please?

A. Can you give me the date—I think it is October.

Q. It is October 12th. A. Am I to read it?

Q. I want you to look at it and see what the conditions were at that time, and tell us of the wind and the weather.

A. That day the ship was under whole topsails, which means a moderate gale, perhaps nothing unusual. Of course, they cannot work the cargo and lift the cargo in very heavy weather. The weather previously was a little—

The COURT.—Q. He has asked you what the weather was at the time the cargo was shifted.

A. At the time the cargo was getting shifted, the weather was what we call ordinary moderate gale; nothing to hurt the ship. They generally have to wait for an opportunity to do this sort of thing.

Mr. FRANK.—Q. See if there is anything imme-

(Deposition of Samuel H. Quayle.)

diately preceding that date to warn him of the condition of his vessel.

A. There is nothing preceding that out of the ordinary, except to indicate to the master that his vessel was laborsome and needed some cargo lifted from the lower hold of the ship into the upper part of the ship, to make her more sea-kindly.

Q. Now, if you will look on September 17th, I think it is, what do you find there is the description of the wind and the sail that the vessel was carrying, and how she was behaving. You can read it out.

A. "P. M. Fresh breezes with head sea; ship under topsails and mainsail." That indicates a moderate gale of wind, an ordinary breeze, a good breeze, but nothing to hurt a ship. "4 P. M., more moderate. 10 P. M., set lower main topgallant sail and main topgallant sail. Midnight, still heavy sea with southwest squalls. 2 A. M., set lower foretopgallant sail, jibs, etc." Weather "More moderate." 8 A. M., stowed mainsail, with violent rolling. No work done, being Sunday."

Q. What does that indicate to your mind under those conditions, the rolling that is described there, as to the vessel being properly stowed or otherwise?

A. I should say the ship was laboring then.

Q. Where were they at that time?

A. They were in 39° south, in the South Atlantic, just a little below the River Platte; between the River Platte and Staten Island, where we usually encounter

(Deposition of Samuel H. Quayle.)

what we call moderate weather, not so stormy as we have to put up with off the Horn.

Q. On September 18th, do you find something there about the carpenter calking the decks?

A. Yes, sir.

Q. Just see what the conditions were then.

A. Light northerly breeze, carpenter calking the main deck; hands securing the cargo fore and between-decks, the lower fore and between-decks in the forward end of the ship, both in the lower hold and between-decks. The carpenter was calking the main deck.

Q. What would you say concerning the condition of a vessel whose decks required calking in that latitude, not having met with any unusual weather from the time she had departed on her voyage?

A. That it should not have been necessary to be calking down there.

Q. What would it indicate to you in reference to the action of the vessel?

A. That the vessel was laboring and opening her decks, straining her decks at the time, and they found it necessary to calk them.

Q. The carpenter has said something about the decks usually being opened or requiring calking when they passed through the hot tropics. Is that in the neighborhood where such things are likely to happen?

A. No, sir, it was rather past where they would be doing it, if it was caused by passing through the tropics.

(Deposition of Samuel H. Quayle.)

Q. After having experienced adverse weather off the Horn and turning back, would the wind be favorable or otherwise to making the Falkland Islands?

A. If the wind was adverse for getting around the Horn to the westward, it would be a fair wind to go to the Falkland Islands.

Q. In a steel ship, when the vessel is laboring and straining, what parts of the vessel would likely be affected the most? A. The decks, first of all.

Q. What effect would it have upon the decks?

A. Open the seams up, and make the decks work; that is, making them leak.

Cross-examination.

Mr. PAGE.—Q. When a ship is straining, or, rather, when a ship is rolling, and rolling very heavily, what is the first weak spot in the ship—the spars?

A. It is a good deal according to the rig of the ship, and according to the strength the rigging is placed in a ship.

Q. Is it not the common understanding among seamen that when a ship rolls very heavily indeed, her spars are likely to be affected?

A. Yes, sir, if she rolls with a natural roll, with heavy swells on abeam; and a natural roll is not a jerk or laborseme.

Q. Is not the fact of jerking something that would produce an injury to the spars?

A. No, it is not always necessary, in my opinion.

(Deposition of Samuel H. Quayle.)

Q. Will you look in that log-book as of the first day of October, and say whether, on that day, there was not a gale and the ship was laboring and shipping large quantities of water. Does it not say so?

A. Shall I read it out?

Q. No; isn't it practically that? If I am wrong, correct me, because I do not want so much put into the record. Does not that show the existence of a fresh gale and the ship shipping large quantities of water?

A. There is a fresh gale mentioned in the log-book. Although there is a fresh gale, there is nothing unusual to hurt or strain a ship under ordinary circumstances.

Q. Please answer my question, Captain. I asked you whether the entry in the log-book on October first did not show the existence of a fresh gale and the ship was laboring and shipping large quantities of water.

A. It mentions here a fresh gale.

Q. Can you not tell me whether it mentions those facts?

A. That is a fact. But another thing, shall I mention my opinion as to what sail she has got?

Q. No, you are not here as an advocate of either party; you are simply to tell the truth. Now, I ask you the question, if it does not show a fresh gale, the ship laboring and shipping large quantities of water?

A. Yes, sir.

Q. Now take the second of October; what weather does it record on the second of October?

(Deposition of Samuel H. Quayle.)

A. Still a hard gale.

Q. And what sort of weather on the third of October?
A. A gale.

Q. On the fourth of October, what sort of weather?

A. No gale that day.

Q. Does it not show that the vessel was heaved to on that day, and that they were using oil out of the water-closet?

A. Yes, sir, they were using oil in the water-closet. "2 A. M."—that was the next morning—"Gale started afresh."

Q. And the vessel was heaved to and they used oil out of the water-closet?

A. Yes, sir, the vessel must have been heaved to.

Q. And on the fifth, was she not still hove to and a heavy gale?

A. No. The gale was increasing again. Yes, afterwards they set sail, and then had to take it in again.

Q. And heave to?

A. No, she was not hove to. She has reefed sails on.

Q. Does it not show she was hove to there?

A. Yes, sir, it does; hove to on the port tack.

Q. Is she not still hove to on the 6th, and heavy weather?

A. Allow me to give an opinion.

Q. No, never mind an opinion. On the 6th was she still hove to, and a gale?
A. Yes, sir.

(Deposition of Samuel H. Quayle.)

Q. And the entry is that there was no chance to serve out fresh water? A. Yes, sir.

Q. Where is the water kept?

A. In a tank in her hold amidships. That is the usual thing in a ship.

Q. And on the 7th there was still a gale?

A. Yes, sir.

Q. And on the 9th? A. You missed the 8th.

Q. I say on the 9th.

A. Weather moderate on the 9th, and the ship under topsails.

Q. Taking water through the fore hold, was she not?

A. No, I think you have the wrong date there. October 9th says, "Find that a considerable quantity of salt water had gone fore hold through the decks." But that was not that day. That was through the previous gale.

Q. On the 11th did she have hard weather?

A. Yes, the breezes seem to have increased. They got moderate weather, and increased, and then got more moderate weather again.

Q. What is the entry about the increase?

A. "4 P. M. Breeze increasing rather quickly, shortened down. 5:30. Called all hands and took in mainsail and west topsails. Continuous seas breaking on board and flooding the decks fore and aft."

Q. On the 12th was the day when you found they

(Deposition of Samuel H. Quayle.)

were shifting the cargo from the forepart of the fore hold and raising it between-decks? A. Yes, sir.

Q. Now, after having read all of those entries, showing the ship was hove to a large portion of the time, and that every day from the first to the tenth of October she had heavy weather, do you mean to say nothing occurred in the meantime out of the ordinary in the way of weather?

A. Taking the sails the ship was carrying, there was nothing out of the ordinary.

Q. The entries, in your judgment, are not true?

A. The entries are true, but the weather is not unusual.

Q. It is not unusual for a vessel to be hove to for three days? A. No.

Q. Do you call that fairly good weather?

A. No, but it is not unusual.

Q. Is not that the kind of weather in which ships are very often injured and lost, when they are driven to heave to in the sea? A. Yes, sir.

Q. And was there not a terrific gale on the 13th?

A. Before I answer that, I will say there is no extreme gale mentioned there. From the sail the ship is carrying, there was no extreme gale. On the 13th there was, yes, taking the upper topsails, after setting down two lower sails.

Q. Does it not show a terrific gale?

A. Yes, sir, squalls blowing with terrific violence.

Q. What sort of weather was it on the 14th?

(Deposition of Samuel H. Quayle.)

A. During the day the gale increased to hard squalls.

Q. And on the 15th?

A. Gale increasing; bad, threatening appearance.

Q. On the 16th? A. High gale still continues.

Q. And on the 17th?

A. Gale started at 8 o'clock, blew with terrific force.

Q. And on that day they could not serve any fresh water because they had no chance to; does not that appear? A. Yes, sir, that appears.

Q. And on the 18th, 19th, 20th, 21st, 22nd, 23d, 24th and 25th, do not those gales continue every day during all that time?

A. Fresh gales. Fresh gales are only good working breezes. On the 25th they got down the lower top-sails again.

Q. Previous to that, from the 18th on to the 25th, does not every day show the existence of hard weather, bad weather—that is, gales?

A. A moderate gale on the 23d; on the 22d a high gale; on the 19th a fresh gale. That is the only thing you can make out of that. There was a gale on October 18th.

Q. And on October 20th?

A. A fresh gale on the 20th.

Q. Now go on to the 26th, did they have a heavy gale that day?

A. Yes, sir, it mentions a gale from the southwest.

(Deposition of Samuel H. Quayle.)

Q. And on the 27th, what sort of weather did they have that day?

A. Sea smooth, ship under small sail.

Q. No gale that day?

A. It does not mention so. I will read it all—

Q. Don't read it all if it does not say anything about it.

A. "Staten Island in sight. Light southwest breezes and sea smooth. Ship under small sail. Reefed the main topmast, port tack. After grave consideration and consultation with officers, and tradesmen re the damage done to the ship since September 26th to date, and the continuous gales of wind and storms encountered, and the state of the ship generally settling down with the constant leakage through the decks after the great laboring and straining, decided to throw overboard from the ends of the ship, fore and aft hatches, about 50 tons in all."

Q. That is the time of jettisoning the cargo?

A. Yes, sir.

Q. Are you aware of the fact that the log shows a number of the men were injured, sometimes as many as seven men of the crew being laid up, in one form or another?

A. Yes, I am aware of that.

Q. Are you aware of the fact that two of the boats were washed overboard?

A. Yes, I know that.

Q. That everything was washed out of the galley, including the cook?

A. So it says.

Q. All these things you consider something that is naturally to be expected on every trip around the Horn?

(Deposition of Samuel H. Quayle.)

A. I have seen it, but it is not naturally to be expected.

Q. Then your idea about the weather not being unusual is simply because you have gone through equally bad weather, not because it is not to be expected or to be expected?

A. I have gone through bad weather off the Horn. We always expect bad weather off the Horn, and ships are stowed so as to expect it.

Q. And every time you go around the Horn, do you expect such bad weather as is detailed there, some 36 days of continuous storm, with perhaps one day's exception; is that the sort of weather to be expected in going around the Horn?

A. It may be expected, but we do not always get it; but it is the weather we look for off the Horn.

Q. That is your idea, to prepare for having such weather? A. We prepare for it.

Q. But is it not unusual weather, is it not extraordinary weather, gales for 36 days?

A. It is not unusual down off the Horn.

Redirect Examination.

Mr. FRANK.—Q. Is the sail that a vessel carries during a particular period and the barometric conditions better indications of the condition of the wind than the entry the mate makes in the log-book that a gale is a big gale or a terrific gale? Which is the better one to guide you in your judgment?

(Deposition of Samuel H. Quayle.)

A. The sail the ship is carrying is to be considered, because in strong gales the ship cannot carry certain sails.

Q. In forming your judgment, is it based on the fact that she carried certain sails which she could not have carried if the conditions were unusual?

A. She could not carry the sails if it was extremely unusual. In an extreme gale the ship cannot carry any upper canvas.

Q. In reference to the effect of the water in filling the decks or in washing over the vessel, is that greater on a stiff ship than it would be on a lively ship?

A. Yes, sir, much greater.

Q. Then, these damages and injuries that occurred down there might as well be from the nature of her stowage as from unusual conditions of weather?

A. Now, understand me, it could be caused by the unusual stowage.

Q. That is, the unusual condition of her stowage, the stiffness of the vessel would tend to cause her to receive greater injury in a given condition of the weather than she would otherwise? A. Certainly.

Q. Is the heaving to necessarily an indication of bad weather, or might it not also be an indication of bad stowage, making her strain so that it would be better to heave to than to keep on?

A. Not in this case. I do not see anything in the log-book but she is meeting adverse winds, and the ship has to be reduced down because she cannot thrash against the

(Deposition of Samuel H. Quayle.)

high winds. At the same time, was this ship running with this wind free, when the other way she would be carrying her sails. It is a condition that we have to meet with.

Q. I think your attention was called to the entry in the log on October first, and you were confined to the question as to whether or not it did not show fresh gales. What other conditions are described in the log on that day that in your judgment indicate that the weather was nothing out of the way?

A. That the ship was carrying reefed upper topsails and a full main upper topsail, and when a ship can carry them with a high wind, that is what we call head-reaching, the gale is not an unusually heavy gale; nothing out of the way.

Q. And is that the condition you find in regard to the other entries to which your attention was called?

A. Some of them. On that same day, October first, the gale increased and they had to reduce more sail. On October first the gale increases, but the first entry that I alluded to, in the first part of the day, the gale increases and they reduce the sail.

Q. Does it indicate what reduction they made?

A. Yes, sir; lower topsails. That is the condition we have to put the ship into when there is a strong gale.

Q. And is that anything unusual?

A. No, nothing unusual.

Q. An ordinary experience at sea?

(Deposition of Samuel H. Quayle.)

A. It is my experience at sea.

Q. I say, an ordinary experience at sea?

A. Oh, yes, an ordinary experience.

WILLIAM STEELE, called for the libelant, in rebuttal, sworn.

Mr. FRANK.—Q. What is your business?

A. Master mariner.

Q. How long have you been master mariner?

A. About 23 years.

Q. Sailing in what business?

A. In merchant sailers out on to this coast and Australia.

Q. English vessels? A. Yes, sir.

Q. Did you ever come around the Horn?

A. Out this way about twenty-five or thirty times.

Q. What vessel are you in now?

A. The "Simla," a four-masted ship.

Q. A sailing vessel? A. Yes, sir.

Q. Do you know the ship "Musselcrag"?

A. I do not know the ship, but I know the build of her by Lloyd's book. I know the kind of vessel she is.

Q. You know her class? A. Yes, sir.

Q. She is what is called a modern built vessel?

A. Yes, sir.

Q. She is beamy and naturally a stiff ship?

A. Yes, sir.

(Deposition of William Steele.)

Q. What would you say, Captain, with reference to a ship that carried 2,350 tons of cement in her lower hold and 928 in her between-decks, what would you say with reference to her being properly stowed or otherwise?

A. Well, I would consider her not properly stowed, not with a cargo of cement.

Q. How would such stowage as that affect her seaworthiness? A. It would affect it considerably.

Q. In what way?

A. It would make her too stiff, too laborious.

Q. In a seaway, what would be the result to the vessel?

A. She would strain herself naturally, and in very bad weather she will strain herself to that extent and break her running gear, such as top sheets, that they will have no sail to carry her, and that makes her a dozen times worse, makes her unmanageable.

Q. How would it affect her decks?

A. It would affect her decks as quick as anything. If she was a new ship, her decks would show it. Her decks would show it first, very likely.

Q. Have you examined this log-book, Captain?

A. Yes, sir.

Q. And made yourself familiar with the condition of wind and weather as therein described?

A. Yes, sir.

Q. And the behavior of the vessel?

A. Yes, sir, I have looked at it all.

Q. What would you say concerning the weather that that vessel is described in that log-book as having exper-

(Deposition of William Steele.)

inced off the Horn, regarding it being an unusual condition or otherwise?

A. No, sir, I do not think she had as bad weather as I have had off it on two occasions.

Q. How is it with reference to being an unusual condition or not?

A. It is not unusual. It is the ordinary course of weather.

Q. What is to be expected coming around the Horn?

A. What is to be expected coming around Cape Horn, yes, sir.

Q. If, under those conditions, a vessel labored very heavily and strained herself, what conclusion would you come to in respect to her stowage?

A. That she had too much cargo in her lower hold; I would say that sure.

Q. And you would attribute her injuries to her stowage rather than to the weather? A. I do.

Mr. PAGE.—Do not lead the witness quite so badly as that.

Mr. FRANK.—Well, I beg your pardon, Mr. Page.

The WITNESS.—That is what I would attribute it to. I have on two occasions spent fifty days around Cape Horn, in coming here to this port with cement.

Mr. FRANK.—Q. How do you determine, Captain, from the log-book, what the condition of the weather is—from the sail that the vessel carries or from the suggestions in the log about a fierce gale or tremendous weather?

(Deposition of William Steele.)

A. By the sail that she carries, and everything shows a tendency that it is only the ordinary weather. The whole log-book shows it is only the tendency of ordinary weather around Cape Horn.

Q. That is, you take into consideration the entire condition, and not the statement of the mate that he had bad weather?

A. Yes, sir, just the ordinary conditions off Cape Horn.

Q. What would you say in regard to a vessel that would go, for instance, from here to Port Costa, without any ballast in her, in regard to her stiffness?

A. Well, I would not like to trust mine unless I had authority to do so. She must be a very stiff ship.

Q. She must be a very stiff ship if she can do that?

A. Yes, sir.

Q. Meeting adverse weather, going around the Horn, that be favorable or otherwise to making the Falkland Islands?

A. If it was adverse weather to go around Cape Horn, it would be favorable to go to Falkland Islands.

Cross-examination.

Mr. PAGE.—Q. In regard to a ship, who is supposed to be the man that best knows when she is properly stowed?

A. Well, her master is supposed to know as well as any one, and the stevedore; they generally consult together.

Q. And if they come to a conclusion together, is it not

(Deposition of William Steele.)

likely they have exercised the best judgment that could be called upon?

A. Well, was this master ever in the ship before?

Q. I ask you the question, when the master of the ship and the master stevedore consult on the matter, is it not likely they come to a fair conclusion on the subject?

A. If a master is appointed on a ship, you must take into consideration the build and everything else, and if you go out with a tow you gain a little experience of knowing her; a ship kicks so sometimes when you don't think it will.

Q. And ships are very different, are they not?

A. Yes, sir.

Q. Ships of the same build have different characteristics, have they not?

A. Some little things, but not materially.

Q. The question of whether a ship is a little bit stiff, or whether she is a little bit cranky, is not that a matter that can always be told from the build?

A. From the build, generally.

Q. Can that be told absolutely from the build, or better from the experience of the ship?

of build would have exactly the same tendencies, no exceptions; they would have the same tendency with reference

A. Better from the build.

Q. So, in that case, two ships of the same character to being stiff or tender.

(Deposition of William Steele.)

A. As far as being stiff or tender, yes; but they might have some other peculiarities.

Q. What other peculiarities?

A. Well, some little different steering, or something better for carrying sails; some carry one thing better or another thing better, which is a little in the molding, that is all.

Q. You say you have read over that log-book?

A. Yes, sir.

Q. And there is nothing there that any ship might not ordinarily expect to meet?

A. That is all.

Q. In other words, it is the common weather off Cape Horn?

A. It is the usual weather off Cape Horn.

Q. Did you ever come around Cape Horn without having to heave to for days at a time?

A. I think once I had a fairly nice passage around; about once.

Q. In every passage that you have, do you have gales of different forms of intensity, that will last from thirty-six to forty days?

A. I have been fifty days getting 60 miles.

Q. I asked you if, in every voyage you have made, you had that experience.

A. No, sir, not every one; certainly not.

Q. It is an unusual experience to have that kind of a gale, thirty-six or forty or fifty days?

A. A great many vessels have to suffer it.

(Deposition of William Steele.)

Q. You were off the Horn for fifty days?

A. Yes, sir, on two different times.

Q. All the time in heavy gales?

A. Moderate and heavy. It would be heavy and then moderate a little again; perhaps moderate for twelve hours.

Q. If that was so common, why should you mention it as being extraordinary in your own case; why should you mention the fact that once you underwent troubles of that kind?

A. I say twice.

Q. Well, twice out of twenty-five times would be rather unusual.

A. I do not think that this log-book points to the weather that I had at all. It only points to ordinary weather.

Q. You say that was a moderate passage?

A. I would say it was an ordinary passage.

Q. Moderate weather?

A. I do not say it is moderate, but is an ordinary passage.

Q. What ship is yours? A. "Simla."

Q. To whom is she consigned here?

A. To myself.

Q. Who is doing the ship's business? A. Myself.

Q. Who is going to load her out? A. McNear.

Q. How large a ship is yours? A. 2087.

Q. When a ship is stiff, how does it affect her spars?

(Deposition of William Steele.)

A. In what way?

Q. In a heavy gale.

A. If she rolls heavy, it might strain the spars, or it might not. If it is a good, new ship, and all the gears are good, it might not hurt the spars, but it might hurt the standing rig, such as topsail sheets. You lose your sails, then, and your ship becomes unmanageable through being too stiff.

ARTHUR BROWN, called for the libelant, in rebuttal, sworn.

Mr. FRANK.—Q. What is your business?

A. Ship liner.

Q. Did your firm line the ship "Musselcrag" in July, 1900, on her outward voyage? A. Yes, sir.

Q. Did you see the ship leave here for Port Costa?

A. Yes, sir.

Q. What was her condition with reference to having ballast or otherwise?

A. She had lumber in the lining in the lower hold.

Q. That is the lumber they used to line the ship when she took in her cargo? A. Yes, sir.

Q. Was that all she had? A. Yes, sir.

Q. She had no ballast?

A. No, sir; they used the lumber lining to line her, going up.

Q. That is, they distribute it all over the sides and back and up between-decks, so as to give an extra side to the vessel? A. Yes, sir.

(Deposition of Arthur Brown.)

Q. So that that would not act as ballast at all?

A. No, sir.

Cross-examination.

Mr. PAGE.—Q. How many tons of lining did she have on board? A. I do not know.

Mr. FRANK.—I presume there is no question, Mr. Page, but what this entire cargo was consigned to J. D. Spreckels & Bros. Company. Is that admitted?

Mr. PAGE.—Yes, sir.

Mr. FRANK.—I have just one other proposition. From your examination, Mr. Page, it would indicate that you were making some kind of a point concerning who hired the stevedores to load this vessel. Is that a point at issue with you?

Mr. PAGE.—It is in evidence that your parties appointed the stevedore.

Mr. FRANK.—Very well, I will introduce in evidence the charter party. I will ask you to look at it, Mr. Page.

Mr. PAGE.—What is it you want me to see?

Mr. FRANK.—I simply want you to see that it is all right, because I am going to offer it in evidence.

Mr. PAGE.—As far as I know, it is all right. It is a copy.

Mr. FRANK.—Yes, it has the signature here.

Mr. PAGE.—Where is the clause you want to refer to?

(Deposition of Arthur Brown.)

Mr. FRANK.—This is the clause: “It is agreed that the charterers shall have,” etc.

Mr. PAGE.—I have no objection to your offering that clause.

Mr. FRANK.—We offer in evidence this portion of the charter-party, “And it is agreed that the charterers shall have the option of appointing the lumpers and stevedores who are to take in and stow the cargo, who are to be paid by the owners one shilling per ton, weight measurement, but it is especially agreed that the lumpers and stevedores shall be under the direction of the master, and the owners responsible for all risks of loading and stowage.”

That is our case, your Honor.

Mr. PAGE.—That is all we have, your Honor.

Testimony closed.

[Endorsed]: Filed Nov. 24, 1902. Geo. E. Morse, Clerk.

[Title of Court and Cause.]

Stipulation as to Original Log-Book on File.

It is hereby stipulated and agreed by the parties hereto that the original “log-book” introduced in evidence upon the trial of said action and now on file herein, need not be copied and incorporated into the “Apostles on Appeal,” but that the same be filed with the record on appeal to the said United States Circuit Court of Ap-

peals, in the office of the clerk of said Court of Appeals, and may be used and referred to by either party, in case of an appeal, as effectually as if the said "log-book" had been copied in full and incorporated into the said apostles.

Dated December 12th, 1904.

NATHAN H. FRANK,

Proctor for Libelant.

PAGE, McCUTCHEN & KNIGHT,

Proctors for Claimant and Respondent.

[Endorsed]: Filed Dec. 13, 1904. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

[Title of Court and Cause.]

Opinion.

NATHAN H. FRANK, for Libelant.

PAGE, McCUTCHEN, HARDING & KNIGHT, for Respondent.

DE HAVEN, District Judge.—This libel was filed against the ship "Musselcrag" to recover for alleged damage to a cargo of cement, shipped on that vessel at Antwerp for carriage to the port of San Francisco. The cargo consisted of 3,278 tons of cement, and of this 2,350 tons were stowed in the lower hold and 928 tons between-decks. The cement was damaged by reason of water, which came through the seams of the deck, and it is claimed by the libelant that the opening of the seams and the consequent damage to the cargo, was the

result either in whole or in part of improper stowage, in this, that the cargo was not properly distributed, that too much weight was placed in the lower hold, which made the ship so stiff that she would not roll easily, and caused her in a rough sea, to right herself quickly with a jerk or sudden lurch, the effect of which was to place so great a strain upon the deck that its seams were opened. In short, the contention of the libellant is, that the ship was rendered unseaworthy by the improper manner in which her cargo was laden. When she left Antwerp the vessel was sound in hull, and properly equipped, and the evidence shows that in attempting to round Cape Horn she met with storms of extraordinary severity and of several days' duration, during which she labored and strained to such an extent that the seams in her deck were opened and the deck almost continuously flooded with water, making it necessary, in the judgment of the master, to raise some of the cargo from the lower hold, and stow it between decks, in order to ease the ship; and about two weeks after this was done, fifty tons of cement were taken from the lower hold and jettisoned. By reason of adverse winds and the violence of the storms thus encountered, the ship was compelled to abandon the attempt to pass around Cape Horn, and she changed her course and came to San Francisco by way of the Cape of Good Hope and Australia.

By the terms of the bill of lading the ship was not to be responsible for any loss or damage which the cargo might sustain by reason of perils of the sea. The question of fact, therefore, to be decided, is, whether the

damage for which the libellant sues was occasioned by perils of the sea or by improper or negligent stowage, causing the vessel to labor and strain more than she otherwise would have done, and thus contributing to the opening of the deck seams. Upon this question there is a decided conflict in the evidence. Upon the one side three witnesses, one a competent stevedore, and two master mariners, gave it as their opinion that in its stowage the cargo was not properly distributed; that there were about 150 tons too much put into the lower hold and that the effect of thus stowing a heavy compact cargo like that of cement, caused the ship to roll more heavily and increased the strain upon her decks. Upon the other hand, the master of the ship, a seaman of long experience, testified that the cargo was laden under his general supervision, and was, in his judgment, properly distributed; that the ship did not give evidence of unusual straining until the severe weather was encountered, and this evidence is corroborated by the second mate, and also finds some support in the testimony given by two of the stevedores who assisted in loading the ship.

It having been shown that the vessel encountered storms of such violence as to reasonably account for the opening of the seams in her decks and the consequent damage to her cargo, the burden of proof is upon the libellant to establish the fact of improper stowage, contributing to the strain upon the vessel's deck and the resulting injury thereto. *The Neptune*, 6 Blatchf. 193; Fed. Cas. No. 10,118; *The Polynesia*, 30 Fed. 210; *The Fern*

Home, 24 Fed. 502; *The Burswell*, 13 Fed. 904; *Clark vs. Barnwell*, 12 How. 280; *Muddle vs. Stride*, 9 Carr. & Payne, 380. It is not deemed necessary to analyze the testimony, or to discuss the reasons which were given by the expert witnesses in support of the opinions expressed by them. It will be sufficient to say, that after careful consideration of all the evidence, I have reached the conclusion that it is not sufficient to establish the fact of improper stowage. Stowage with a view to the proper trim of the vessel and the ease with which it will be able to carry its cargo when at sea, is a matter which calls for the judgment of those under whose supervision it is done. The carrier is only required to exercise reasonable care and skill in stowing cargo, and the mere fact that if it had been differently distributed the ship would have been more easy, does not necessarily show that the cargo was negligently stowed; that is, stowed in such a manner as would not have been approved at the time by a stevedore or master of ordinary skill and judgment, knowing the voyage upon which the vessel was about to sail, and the weather and sea conditions which she might reasonably be expected to encounter. In order to establish such negligence as is claimed here, the disproportion between the amount stowed in the lower hold and that placed between decks, must be so great as to warrant the conclusion that reasonable judgment was not used in loading the vessel, and I am not satisfied from the evidence that such great disproportion existed in this case.

2. It is further claimed by the libellant that the ship

is liable because of the failure of the master to repair her damage at the Falkland Islands, instead of proceeding to Australia with the decks in the condition in which they were when the attempt to round Cape Horn was abandoned. The evidence certainly shows that the injury which the vessel's decks suffered before sailing for Australia was so severe as to render them unseaworthy with respect to the protection of the cargo, and during the voyage to Sydney the vessel encountered weather so rough that her decks were often filled with water from which cause the cargo received additional damage. When the master of the "Musselcrag" started for Australia, he was within sixty miles of the Falkland Islands, and it seems to me that in the then condition of the ship, he ought, in the exercise of a reasonable judgment, to have sought that port for the purpose of making repairs, and not doing so, he failed to use that care for the protection of his cargo from further damage which was incumbent upon him. For this negligence and breach of the contract of affreightment, the ship is liable. *Niagara vs. Cordes*, 21 How. 7. It is argued upon the part of the claimants, that assuming this action of the master to have been negligent, it was a fault or error in navigation or in the management of the vessel, for which the vessel is not responsible under the 3d section of the Harter Act, 27 Stats. 445; but this was not a fault or error in navigation, or in the management of the vessel, but simply the neglect of the master to take proper care for the protection of the cargo in his custody.

3. The question relating to the measure of damages is more difficult. It is certain that a great part, and probably the greater part of the whole damage which the cargo sustained on the voyage between Antwerp and San Francisco, was occasioned by perils of the sea before the vessel changed her course at Cape Horn and sailed for Australia; but the damage received by the cargo before such change of course and that sustained between Cape Horn and Australia, cannot be separated. The libelant insists that because this separation cannot be made, the ship should be held responsible for the entire damage, as well that occasioned without its fault as that which was caused by the negligence of the master in not going to the Falkland Islands for repairs. In my opinion, the more equitable rule to be applied in this case, is to divide the damages. Under this rule it is reasonably certain that the ship will be required to respond for all of the damage occasioned by its fault, and the libelant has no right to insist upon more than this. In the case of *The Shand*, 16 Fed. 570, it was said;

“In the case of the ‘*Mary Belle Roberts*,’ where the loss from sea peril, if any, was comparatively small, it was just to hold the carrier answerable for the whole unless he could show how much was to be deducted on account of the minor cause as to which he might claim exemption. But if the general circumstances of the case show that the loss has probably arisen as much from the act or cause attributable to the one party as from that attributable to the other, there should be no justice in imposing the whole loss upon one

simply because he could not separate and distinguish the exact amount arising from his own fault, and the rule adopted by Sprague, J., is, in such a case obviously the juster one."

The rule referred to in the above quotation, was announced by Sprague, J., in *Snow vs. Carruth*, 1 Spr. 324; Fed. Cas. No. 13,144; as follows:

"I am satisfied, that the great loss in this case, (above the necessary leakage), was partly attributable to the negligence of the carrier, and partly to the negligence or misfortune of the shipper or consignee, and that it is not practicable to ascertain for how much of the loss the one party or the other, is, in fact, responsible. I am, therefore, obliged to adopt some arbitrary rule in determining the amount to be allowed the respondents. An analogy may be found in the rule adopted by courts of admiralty, in cases of collision, when both parties are in fault. In such cases, the aggregate amount of the damages is divided equally between the parties."

The case of the "Young America," 26 Fed. 174, is precisely in point. "Young America" was a tug, and a canal boat which it had in tow was stranded, and after having been abandoned by the tug became almost a total loss. The tug was sued by the owner of the canal boat for the damage thence resulting. The Court found that the stranding was not caused by the tug's negligence, but that the tug was in fault in leaving the canal boat without any one in charge of it, and that by reason of such abandonment the damage to the canal

boat had been increased. It was held that the damages should be divided, the court saying:

“The nature of the case is such that it seems clearly impossible to determine with any approximation to exactness how much of the whole loss is attributable to the original stranding, and how much to the subsequent want of protection. The best that can be done under such circumstances is to divide the damages, as was done in the case of *Snow vs. Carruth*, 1 Spr. 324.”

It is not deemed necessary to further discuss the questions arising in this case. My conclusion is that the libelant is not entitled to recover for the cargo which was jettisoned, but is entitled to recover one-half of the damage sustained by the remaining cargo, with interest from the date of the filing of the libel and costs of suit, and the case will be referred to Commissioner George E. Morse, to ascertain and report such damages. Let such a decree be entered.

[Endorsed]; Filed Oct. 9, 1903. Geo. E. Morse, Clerk.
By J. S. Manley, Deputy Clerk.

[Title of Court and Cause.]

Interlocutory Decree.

This cause having been heard on the pleadings and proofs, and due deliberation being had thereupon, it is hereby ordered, adjudged and decreed, that the libelant do have and recover one-half of the damages sustained by the part of the cargo delivered in bad order as in said

libel alleged, with interest from the date of the filing of the libel, and costs, and that the said cause be, and the same hereby is, referred to George E. Morse, United States Commissioner, to ascertain and report to the Court the amount of said damage.

Dated, October 27th, 1903.

JOHN J. DE HAVEN,
Judge of the District Court.

[Endorsed]: Filed Oct. 27, 1903. Geo. E. Morse,
Clerk.

[Title of Court and Cause.]

Final Decree.

The above-entitled cause having heretofore been referred to George E. Morse, United States Commissioner, to ascertain and report the damages, in accordance with the opinion of the Court heretofore rendered, and the said Commissioner having reported the said damages in the sum of twenty-eight hundred and fifty-two and $58/100$ (2852.58) dollars, and the time for filing exceptions to said Commissioner's report having expired, and no exceptions having been filed:

On motion of Nathan H. Frank, proctor for libelant, it is hereby ordered, adjudged and decreed that the said report be in all things confirmed, and that the said libelant do have and recover of the said claimant in this action the said sum of twenty-eight hundred and fifty-two

and 58/100 (2852.58) dollars, together with interest thereon from the date of this decree until paid, and costs to be taxed herein; and on like motion,

It is further ordered that a summary judgment be and the same hereby is entered for the amount of this decree against C. W. Corsar, the claimant of said vessel, and against Herman L. E. Meyer and George H. C. Meyer, the sureties on the bond and stipulation given to the marshal for the release of said vessel from custody in said cause, and that the libelant have execution thereon to satisfy this decree.

Dated, November 29th, 1904.

JOHN J. DE HAVEN,

Judge.

[Endorsed]: Filed Nov. 29, 1904. Geo. E. Morse,
Clerk. By J. S. Manley, Deputy Clerk.

[Title of Court and Cause.]

Notice of Appeal of C. W. Corsar.

Please take notice that C. W. Corsar, the owner of the ship "Musselcrag," etc., respondent in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the District Court of the United States, for the Northern District of California entered in said cause on

the 29th day of November, A. D. 1904, and from the whole of said decree.

Dated December 28th, A. D. 1904.

PAGE, McCUTCHEN & KNIGHT,

Proctors for Respondent.

To the Libelant in the Above-entitled Cause,

and to Nathan H. Frank, Esq., its Proctor.

Service of a copy of the within notice of appeal is hereby admitted this 28th day of December, 1904.

NATHAN H. FRANK,

Per LILLICK,

Proctor for Libelant.

[Endorsed]: Filed Dec. 29, 1904. George E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

[Title of Court and Cause.]

Assignment of Errors of C. W. Corsar.

Now comes C. W. Corsar, the owner of the ship "Mus-selcrag," etc., respondent in the above-entitled cause, and herewith files with the Court the following assignment of errors in the decision and decree of this Court:

1. The Court erred in entering its decree in favor of the libelant in the sum of \$2,852.58.

2. The Court erred in not dismissing the libel.

3. The Court erred in its findings that it was the duty of the master to seek the Falkland Islands and in holding it to be negligence on his part that he did not do so.

4. The Court erred in its finding that the act or omission of the master, if such it was, in not seeking the Falkland Islands was not a fault or error in the navigation or management of the ship within the protection of the Harter Act.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Respondent.

Service of a copy of the within assignment of errors is hereby admitted this 28th day of December, 1904.

NATHAN H. FRANK,
Per LILLICK,
Proctor for Libelant.

[Endorsed]: Filed Dec. 29, 1904. George E. Morse,
Clerk. By J. S. Manley, Deputy Clerk.

[Title of Court and Cause.]

Notice of Appeal of J. D. Spreckels & Bros. Co.

To the Respondent and the Claimant in the Above-entitled Cause and to Messrs. Page, McCutchen and Knight, their Proctors:

You and each of you will please take notice that J. D. Spreckels & Bros. Co., libelant above named, intends to and hereby does appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the District Court of the United States, in and for the Northern District of California, entered in the

above-entitled cause on the 29th day of November, A. D. 1904, and from the whole of said decree.

Dated, San Francisco, January 3, 1905.

NATHAN H. FRANK,

Proctor for Libelant, J. D. Spreckels & Bros. Co.

Due service of the within notice of appeal is hereby admitted this 4th day of January, 1905.

PAGE, McCUTCHEX & KNIGHT,

Proctors for Claimant.

[Endorsed]: Filed Jan. 4, 1905. James P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

[Title of Court and Cause.]

Assignment of Errors of J. D. Spreckels & Bros. Co.

Now comes J. D. Spreckels & Bros. Co., a corporation, libelant in the above-entitled cause, and makes this, its assignment of errors on the appeal taken by it in the above-entitled cause from the decree entered by the District Court of the United States for the Northern District of California on the 29th day of November, 1904, and states that error was committed by said Court in the making of said decree and in the proceedings prior thereto in the following matters, to wit:

1. The Court erred in finding that the libelant is entitled to recover only one-half of the damages sustained by the part of the cargo delivered in bad order as in the libel in said action alleged, and erred in entering its decree in favor of the libelant in the sum of two thousand

eight hundred and fifty-two and $58/100$ (2,852.58) dollars, and in not entering such decree in favor of libelant in the sum of five thousand six hundred and five and $16/100$ (5,605.16) dollars, together with a sum equal to the value of the cargo jettisoned by the ship.

2. The Court erred in not finding that the libelant is entitled to recover all of the damages sustained by the part of the cargo delivered in bad order, as in the said libel alleged, and also for the cargo jettisoned by the ship.

3. The Court erred in dividing the damages suffered by said libelant.

4. The Court erred in not finding that said vessel was unseaworthy at the inception of the voyage by reason of improper loading of said vessel, and that the damage to libelant was the result of such unseaworthiness and improper lading.

5. The Court erred in holding that the carrier is only required to exercise reasonable care and skill in stowing cargo with reference to the trim of the ship, and in not holding that a vessel with cargo stowed so as to affect her trim sufficiently to cause her to strain is unseaworthy.

6. The Court erred in holding that the carrier is only required to exercise reasonable care and skill in stowing her cargo with reference to the trim of the ship, and in not holding that the carrier warrants the ship seaworthy with respect to stowage of cargo as it relates to the trim of the vessel.

7. The Court erred in not finding that said vessel was improperly stowed, and in not finding that it was unseaworthy in that respect, and further in not finding that the straining of the vessel, opening of her seams, and consequent damage to libelant was due to such unseaworthiness.

Dated, January 3d, 1905.

NATHAN H. FRANK,
Proctor for J. D. Spreckels & Bros. Co.

Due service of the within assignment of errors is hereby admitted this 4th day of January, 1905.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimants.

[Endorsed]: Filed Jan. 4, 1904. James P. Brown,
Clerk. By J. S. Manley, Deputy Clerk.

[Title of Court and Cause.]

Stipulation Re Transcript.

It is hereby stipulated that the transcript on appeal to be filed in the above-entitled action by C. W. Corsar, claimant, on his appeal from the final decree of the District Court of the United States, in and for the Northern District of California, entered in the above-entitled cause on the 29th day of November, A. D. 1904, may be used in the United States Circuit Court of Appeals for the Ninth Circuit as the transcript on appeal and with the same force and effect as if it had been duly filed as such,

on the appeal of J. D. Spreckels & Bros. Co., a corporation, from the said final decree entered in the above-entitled cause upon the 29th day of November, A. D. 1904.

Dated, San Francisco, January 5, 1904.

PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant.
NATHAN H. FRANK,
Proctor for Libelant.

[Endorsed]: Filed Jan. 4, 1905. James P. Brown,
Clerk. By J. S. Manley, Deputy Clerk.

Clerk's Certificate to Transcript.

United States of America, }
Northern District of California. } ss.

I, James P. Brown, clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed one hundred and twenty-five (125) pages, numbered from 1 to 125, inclusive, contain a full, true and correct transcript of the record in said District Court in the cause entitled "J. D. Spreckels & Bros. Co., a Corporation, vs. The Ship 'Musselerag,' her tackle, apparel and furniture," made up in pursuance to Rule Four of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of seventy dollars and seventy cents (\$70.70), and that the same has been paid to me by the proctors for claimant and appellant.

Attest my hand and the seal of the said District Court this 25th day of January, A. D. 1905.

[Seal]

JAS. P. BROWN,

Clerk.

[Endorsed]: No. 1167. United States Circuit Court of Appeals for the Ninth Circuit. C. W. Corsar, Claimant and Owner of the British Ship "Musselcrag," Appellant, vs. J. D. Spreckels & Bros. Company, Appellee, and J. D. Spreckels & Bros. Company, Appellant, vs. C. W. Corsar, Claimant and Owner of the British Ship "Musselcrag," Appellee. Transcript of Record. Upon Appeal and Cross-Appeal from the United States District Court for the Northern District of California.

Filed January 25, 1905.

F. D. MONCKTON,

Clerk.

*In the District Court of the United States, for the Northern
District of California.*

J. D. SPRECKELS & BROS. CO.,
Libelant,)
vs.)
Ship "MUSSELCRAG," etc.)

Stipulation as to Certain Facts in the Cause.

It is hereby stipulated that on the trial of the above-entitled cause, it shall be taken as a fact admitted to be true that all the facilities necessary for effecting repair of the injuries to the "Musselcrag," occasioned during her voyage up to the time she reached about the latitude of the Falkland Islands, could have been had at Port Stanley in the said Islands.

PAGE, McCUTCHEN, HARDING & KNIGHT,

Proctors for Respondent.

[Endorsed]: Filed October 27th, 1902. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

I, James P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of stipulation as to certain facts in the cause, in the

cause entitled, "J. D. Spreckels & Bros. Co. vs. Ship 'Musselcrag,' etc.," No. 12,145, and now remaining on file and of record in my office. And I further certify that the same constitutes and forms a part of the Apostles on Appeal in the said cause.

Attest my hand and the seal of the said District Court this 3d day of February, 1905.

[Seal]

JAS. P. BROWN,

Clerk.

[Endorsed]: No. 1167. United States Circuit Court of Appeals for the Ninth Circuit. C. W. Corsar, Claimant and Owner of the British Ship "Musselcrag," vs. J. D. Spreckels & Bros. Co., a Corporation, and Vice Versa. Stipulation as to Certain Facts in the Cause. Filed Feb. 3, 1905. F. D. Monckton, Clerk.

At a stated term, to wit, the October term A. D. 1904, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Monday, the twentieth day of February in the year of our Lord one thousand nine hundred and five. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Honorable ERSKINE M. ROSS, Circuit Judge, Honorable THOMAS P. HAWLEY, District Judge.

C. W. CORSAR, Claimant and Owner
of the British Ship "MUSSELCRAG,"
Appellant,

vs.

J. D. SPRECKELS & BROS. CO. (a
Corporation),

Appellee,

and

J. D. SPRECKELS & BROS. CO. (a
Corporation),

Appellant,

vs.

C. W. CORSAR, Claimant and Owner
of the British Ship "MUSSELCRAG,"

Appellee.

No. 1167.

Order Granting Motion to File Deposition of Captain Robert Johnston.

The motion of counsel for the appellant C. W. Corsar, claimant, etc., for permission to file the deposition of Captain Robert Johnston, having been heretofore and

on the 6th day of February, 1905, submitted to the Court for consideration and decision, and having been duly considered, it is ordered that the said motion be, and hereby is granted.

In the United States District Court for the Northern District of California.

J. D. SPRECKELS BROS. & CO. }

vs. }

British Ship "MUSSELCRAG." }

Deposition of Captain Robert Johnston.

It is hereby stipulated that the deposition of Captain Robert Johnston, for use on appeal to the Circuit Court of Appeals, in the above cause may be taken upon the interrogatories and cross-interrogatories hereunto annexed before any consular officer of the United States at Liverpool, or before any notary public, who is hereby authorized to administer an oath to the witness, to cause his answers to be taken down in shorthand and transcribed and to certify to the said deposition and cause it to be returned endorsed upon the envelope with the name of this cause to George E. Morse, Esq., Clerk of the United States District Court, San Francisco, California.

When the said deposition shall be taken and returned as aforesaid, the claimant upon perfecting the appeal shall, if so advised, apply under the rules for an order that further testimony be allowed to be taken and if

such order be granted the said deposition shall be deemed to have been taken under the said order.

All objections to questions and answers in said deposition, except as to the form thereof, as well as all objections to the introduction of said testimony in the Court of Appeals are hereby reserved.

NATHAN H. FRANK,

Proctor for Libelant.

PAGE, McCUTCHEN & KNIGHT,

Proctors for Claimant.

*In the District Court of the United States for the Northern
District of California.*

J. D. SPRECKELS BROTHERS & COMPANY,	} Libelant,
vs.	
British Ship "MUSSELCRAG," etc.	}

Interrogatories to be Propounded to Robert Johnston, a Witness
Produced on Behalf of the Claimants.

1. Please state your name, age, residence and occupation.

2. If you are master of a vessel, state of what vessel, you are now master and who the owners of such vessel are.

3. Are you the same Robert Johnston who was master of the "Musselcrag" in the month of July, 1900, and who testified by deposition on behalf of the claimants of the "Musselcrag" at San Francisco in a suit brought

to recover for damage to cement by J. D. Spreckels Bros. & Company?

4. Do you remember the fact that on the voyage from Liverpool to San Francisco referred to in your deposition taken at that time you failed to round Cape Horn and that you then sailed eastward?

5. State to the best of your recollection when it was that you changed your course with the intention of taking the eastward passage, and state further where your ship was at that time.

6. You stated in your examination by deposition on the occasion already referred to that you started for the east, abandoning the effort to go round Cape Horn, on November 4th, 1899, and that you were then in latitude 56.34 south, longitude 60.34 west. Assuming that you were correct in these statements, how far was your ship on that day from Port Stanly in the Falkland Islands?

7. Why did you not sail for Port Stanly, in the Falkland Islands to make repairs instead of undertaking the passage by the Cape of Good Hope before making repairs?

8. What evidence, if any, was there in the condition of your ship to show that it was dangerous to her cargo to carry it forward without putting back to Port Stanly?

9. In your judgment as a master mariner was it a prudent or imprudent thing to do to turn back to Port Stanly under the conditions in which you found your ship on or about November 4, 1899.

10. In your judgment as a master mariner, under

all the conditions which presented themselves to your mind on November 4, 1899, what was the prudent and proper course for you to follow regarding the navigation of the ship having regard to the interests of ship and cargo.

11. If there be any other matter within your knowledge on the subject inquired of in the above interrogatories, please state the same fully and particularly.

PAGE, McCUTCHEM & KNIGHT,
Proctors for Claimant.

No cross-examination.

NATHAN H. FRANK.

In the United States District Court for the Northern District of California.

J. D. SPRECKELS BROS. & Co. }

vs. }

British Ship "MUSSELCRAG." }

The Answers of Robert Johnston to the Interrogatories Annexed
Hereto.

1. Robert Johnston; aged 51; Lake View, Valentines Road, Ilford, Essex; Shipmaster.
2. Ship "Glenburn." Robert Shankland & Co., Greenock.
3. Yes.
4. Yes. The voyage was from Antwerp to San Francisco, not from Liverpool as mentioned in the interrogatory.

5. Fourth November, 1899. Latitude 56.34 S. Longitude 60.34 west.

6. Three hundred and seven miles.

7. I did not on the 4th November, 1899, anticipate having to put into any port of refuge to repair.

8. None at that time. The extensive damage subsequently repaired at Sydney was not then anticipated and was not ascertained until some weeks after the 4th November after we had an opportunity of making an examination.

9. I did not consider it necessary on the 4th November, 1899, to put into any port. For the reasons stated in the answer to the next interrogatory it would not have been prudent in my opinion to have put back to Port Stanly.

10. On the 4th November, 1899, when I ceased my attempt to round Cape Horn to the westward and bore away to the eastward I could have made Port Stanly but my object in going east was to complete the voyage to San Francisco as soon as possible under the circumstances. My thirty-five years' sea experience led me to expect favorable weather and winds by going east. When I bore away to the eastward I did not as already stated anticipate the necessity of putting into any port to repair. To the best of my recollection it was some three weeks after bearing away from the Horn when the weather became more favorable and we had an opportunity of thoroughly examining the hold and found a considerable number of the bulwark stanchion nuts

broken off under the stringer plate, that I first considered it might be advisable to put into some port to repair. Before we were able to properly examine this part of the hold, we had to move a considerable portion of the cement, which was stowed a tier higher in the mid-ship part of the 'tween decks. When I bore away to the eastward, I believed my ship was in a fit condition to carry her cargo safely to San Francisco without any repairs. I further considered that the most prudent and proper course to pursue was to get my cargo to its port of destination as quickly as possible and without detention for repair and probable discharge and restowage. As a master of considerable experience I may state that had it occurred to me on the 4th November, 1899, that it might be necessary to put into some port for repairs, I should have avoided the Falkland Islands, being aware that the continuous bad weather in those latitudes makes the steady progress of work impossible and that the scarcity of workmen renders despatch a matter of the laborers' convenience and pleasure, thus causing endless delay, which would have been prejudicial to my then already partially damaged cargo of cement. Further the expense of executing the repairs would have been greatly increased and the expenses incidental to the laying in port would also be increased.

11. I have had thirty years' experience in the Australian trade, passing round the Cape of Good Hope to the eastward at all seasons of the year and I felt convinced that with the run of weather I had encountered on those passages there was nothing in that passage to further

damage the "Musselerag" or her cargo, and I certainly never anticipated the exceptionally heavy weather we experienced whilst running down our easting between the Cape of Good Hope and the Australian Coast. On the Australian Coast our decks looked as well as when we left Antwerp and the seams were good and had it not been for the damage discovered after the 4th November, 1899, the steering gear breaking down, and the fear of not being able to replenish our supply of water and the possibility of meeting with heavy weather in the Pacific, I should have continued our passage to San Francisco and not have put into Sydney. On arrival at Sydney, our cargo, except for the salt water stains, appeared to be in good order and the hold dry. I acted in the best of my judgment as a master mariner and I say I adopted the most prudent course possible under the circumstances regarding the navigation of the ship and the interests of the ship and cargo.

ROB. JOHNSTON.

JOHN DICKINSON,

Notary Public.

I, the undersigned, Vice and Deputy Consul of the United States of America, for the Port of Liverpool, and its dependencies, do certify and make known, to whom these presents shall come, that the signature John Dickinson to the annexed Certificate subscribed is genuine. That the said John Dickinson is a Notary Public of respectability, doing business in Liverpool and that to the said Certificate, as signed, in my opinion full faith and credit are due.

Given under my Hand and Seal of Office in Liverpool, this 9th day of Jany., and year of our Lord one thousand nine hundred and four.

[Seal]

W. J. SULIS,
Vice and Deputy U. S. Consul.

State of California,

City and County of San Francisco.

} ss.
Ship "Musselcrag."

Robert Johnston, being duly sworn, deposes and says: that he has read the foregoing interrogatories and answers thereto and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

ROB. JOHNSTON.

Subscribed and sworn to before me this 9th day of January, 1904.

[Seal]

JOHN DICKINSON,
Notary Public, Liverpool.

[Endorsed]: No. 1167. United States Circuit Court of Appeals, for the Ninth Circuit. In the District Court of the United States, Northern District of California. J. D. Spreckels Brothers & Company, Libelant, vs. British Ship "Musselcrag," etc. Deposition of Captain Robert Johnston. Interrogatories to be propounded to Robert Johnston, a witness produced on behalf of the claimants, and the answers thereto.

No. 1167. United States Circuit Court of Appeals for the Ninth Circuit. Filed pursuant to order of Court, entered: Feb. 20, 1905. F. D. Monckton, Clerk.

No. 1167.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

J. D. SPRECKELS & BROS. CO.,

Appellant,

vs.

C. W. CORSAR,

Appellee.

FILED
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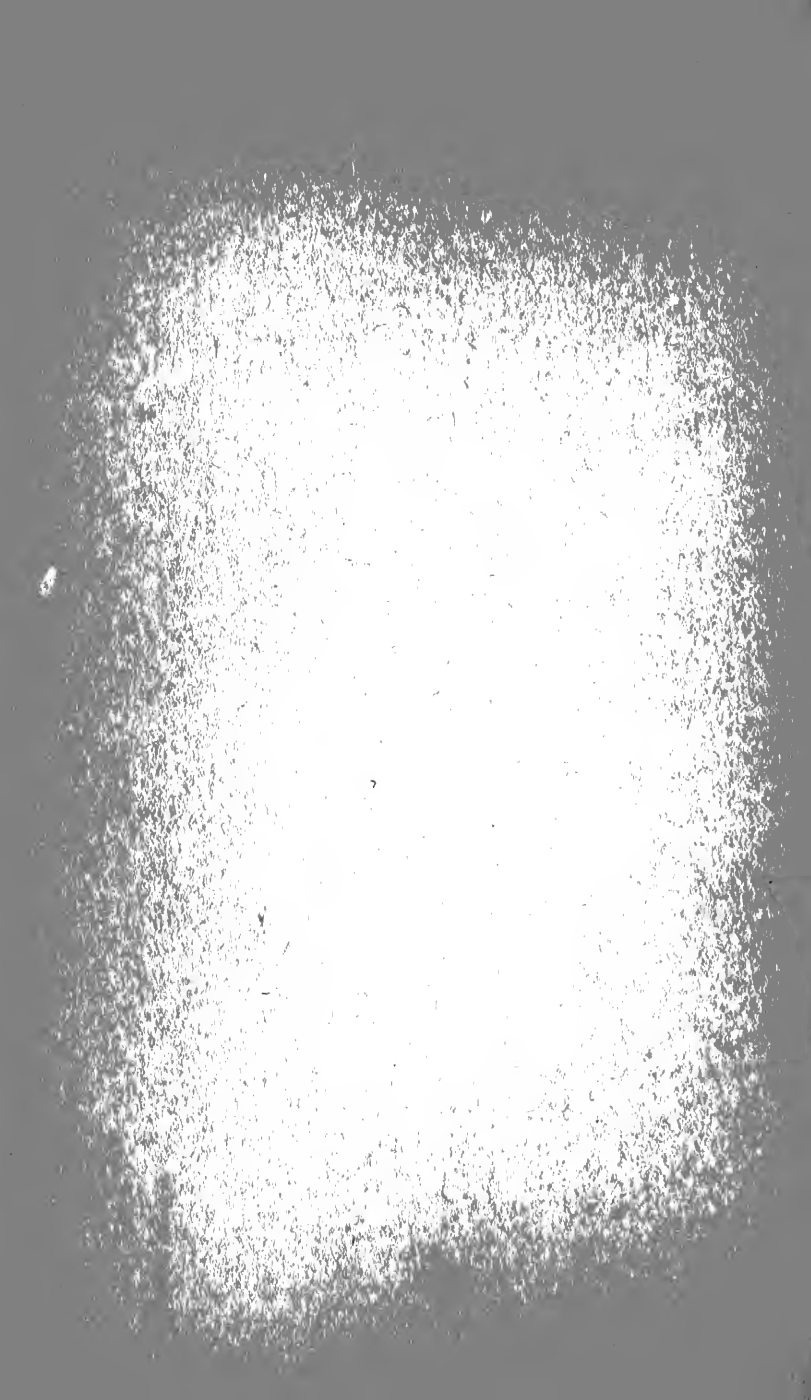
PETITION FOR A REHEARING.

CHARLES PAGE,

EDWD. J. McCUTCHEN,

SAMUEL KNIGHT,

Proctors for Appellee.



No. 1167.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. D. SPRECKELS & BROS. CO.,

Appellant,

vs.

C. W. CORSAR,

Appellee.

PETITION FOR A REHEARING.

On behalf of the "Musselcrag", we pray for a rehearing in this cause. Our petition is based upon our belief that the majority of the court has overlooked the application of two rules of law, as we understand them, to the facts of the case, and has made a mistake in the consideration of the question of the weight of evidence.

I.

We concede the correctness of the rule quoted in the opinion of Judge Ross from the case of *The Ports-*

mouth, 9 Wall. 682, that if damage be caused *by the carrier's fault*, he is liable, even though a sea peril "be present and enter into the case". The efficient cause under such circumstances, not the cause nearest in point of time to the disaster, is to be deemed to be the cause upon which responsibility is based.

The rule, however, does not assume to say that *the mere presence* of a fault on the carrier's part prevents the defense of sea-perils. Such fault must be the *efficient* cause of the disaster, not merely a concomitant, of another cause, which is the efficient cause.

No ship should sail with an improper compass. Yet, if while sailing in sight of land, a fog and calm of several days' duration settle upon the waters and treacherous currents drive such a vessel upon the rocks, the court would not hesitate to say that the sea peril was the efficient cause of the disaster, and that the breach of the warranty of seaworthiness in failing to have a proper compass, was not a reason for decreeing a recovery against the owner.

If, in the case at bar, the court is justified in finding that the ship sailed from Antwerp in an unseaworthy condition *and* that this unseaworthiness was the *efficient* cause of the injuries which she suffered in the gales and hurricanes off Cape Horn, the judgment is in accordance with the decisions. But, if it appear that the weather encountered by the ship was of such a nature that it may justly be said, that even an absolutely seaworthy vessel would have strained and labored and suffered from its fury, then, we submit, that it is too

harsh an interpretation of the law to say that proof of the fact, even were such proof beyond question, that the ship's trim on leaving port tended, perhaps, to make her too stiff, is sufficient evidence that this fault was the *efficient* cause of the disaster, rather than the sea perils.

The matters of fact before the court are whether the stowage was so bad as to make the ship unseaworthy when she sailed upon her voyage to San Francisco and whether such fault, if there was any, was the efficient cause of the damage which she afterwards suffered.

Every ship, as is well understood, warrants to the cargo owner that, on sailing, she is *reasonably* fit in hull, equipment, crew and stowage, to meet the ordinary perils of the voyage. All losses thereafter caused to such a vessel, or her cargo, which are not attributable to negligence upon the voyage and are shown to be caused by the action of the sea, or by dangers attending navigation, are losses by sea perils.

“Waves beating on the ship and so injuring her as to prevent or delay the voyage, or *causing her to roll or strain*, with the result that the goods become displaced and damaged, these are all losses by dangers of the sea.”

Carver on Carriage by Sea, Sec. 85.

“It must be remarked that the losses need not be extraordinary, in the sense of arising from causes which are uncommon. *Rough seas, which are characteristically sea perils, are common incidents of a voyage. But damage arising from them, whether by their beating into the ship, or driving her on to rocks, is within the exception,*

if there has been no want of reasonable care in fitting out the ship and in managing her.

Carver, Carriage, etc., Sec. 37.

The rule regarding stowage is stated in *Lawrence v. Minturn*, 17 How. 100:

The owner "contracts for the use of due care and skill in stowing the cargo and in navigating the vessel * * * (p. 112).

"The master is bound to use due diligence and skill in stowing and staying the cargo, *but there is no absolute warranty that what is done shall prove sufficient*" (p. 115).

The contract of a chartered ship, not put up as a general ship, is not that "of a common carrier, but of "bailees for hire, bound to the use of ordinary care "and skill".

Sumner v. Caswell, 20 F. R. 251;

Lamb v. Parkman, 1 Sprague 353;

Nugent v. Smith, 1 C. P. Div. 423 (1876).

The "Musselerag" was a large, beamy ship of great carrying power. She was loaded at Antwerp with a cargo of cement by stevedores whose ability may be assumed from their selection by the libellants. These worked under the general supervision of the master, a man of long experience who, however, had just joined this particular ship. The master and stevedore testified to the particular pains taken in making the stowage and to the fact that in their opinion, what they had done was well done and in the usual way and that the ship was seaworthy, as to stowage. In this respect, the ship's carpenter corroborated them. When the

ship left the River Scheldt and came into salt water, her cargo was insufficient to bring her down to her marks. She was, therefore, certainly not overloaded. This fact shows that allowance had been made for the dead weight cargo. In her hold, she carried 2350 tons, on her between decks 928 tons. It is contended that the disparity between these weights made the ship too stiff and that this was the efficient cause of the straining which she underwent when she reached the stormiest of latitudes. Two captains gave it as their opinions that the ship should have had more cargo above and less below; about 100 tons should have been transferred. Wilson, a San Francisco stevedore, testifying four years after the ship had discharged at San Francisco, corroborated these witnesses, and Burke, another stevedore, testified to facts concerning the stowage which in some particulars contradicted the master of the "Musselcrag". These witnesses, the majority of the court decides, carry more weight than those who testified on behalf of the ship. The court recites, as a fact, that all of the witnesses gave their evidence by deposition. *This is a mistake.* The four witnesses named testified *viva voce* before the lower court. That court declined to accept their expert evidence as against the direct evidence of the master and others of the ship's witnesses. And well it might have done so, in view of the exaggerations of Captain Quayle and the eagerness of Burke and Wilson.

These witnesses knew nothing of the "Musselcrag", as a ship, or of the effect upon her buoyancy of the precautions adopted by the master; they agreed that

the best judges of a ship's stowage were the master and stevedore who loaded her and who, they said, usually consult together as to the loading (Tr. pp. 103, 124); and they conceded that ships differ very much from each other in their buoyancy.

“One ship will require more ballast and another less, and it is for the master to judge whether any, and what ballast will be required by his ship during a proposed voyage, having regard to the nature of the proposed cargo.”

Weir v. Union S. S. Co., 9 Asp. M. C. 112, 114.

“Much latitude must be given to the master's judgment and the courts may not too nicely criticise his conclusions.”

McLeen v. Davis, 110 F. R. 576.

The master and carpenter, in performing their duties before the ship left port, had to consult the safety of their own lives, as well as that of ship and cargo, a fact not unworthy of consideration (*Lawrence v. Minturn*, 17 How. 111). Again, the master was acting for the ship and cargo, while thought of the safety of the cargo was chiefly in the stevedore's mind. Now, every ship rolls and strains in heavy weather, however well she may be loaded. This, as *Carver* says, is one of the perils of the sea (see *The Manitoba*, 104 F. R. 153). Deadweight cargoes, such as cement, are peculiarly trying in this respect. If this ship had not sufficient buoyancy, if she was too stiff to be manageable, one would expect that the heavy natural swells of the German Ocean, the English Chan-

nel, the Bay of Biscay and the Atlantic, acting normally, would have produced indications of the fact, yet the log and the evidence show that not until September 17th, *sixty days* after sailing (the ship left Antwerp July 19th), is any mention made of rolling and *then* it occurred when, at midnight, there had been *a heavy sea with southwest squalls*. This entry was followed by one reciting the taking in of the mainsail in the morning, an indication of still heavier weather. (See *Remarks from Logbook*, p. 3.)

With the first signs of bad weather, the master prudently overhauled his stowage, as the next day's record shows, and made all things secure. Are we right in saying that the decision of the court seems to imply, if not to say, that this is *an admission* that the ship's rolling had broken the cargo loose? Are we right in saying that the performance by the carpenter during part of a morning of the common duty of going over the seams of a deck and caulking where oakum is found to be slack, is taken by the court to be *an admission* that rolling had opened the ship's decks? If we are, then we fear that every ship that crosses the line from calms into storm seas, from torrid heat, which separates the oakum from the sides of the planks, into latitudes where rains are plentiful, and keeps a record of the doings of the crew, writes herself down as admitting unseaworthiness at departure!

Emphatically we claim, and respectfully we submit that these two months of experience at sea, without rolling or straining, indicate that the "Musselcrag" was sufficiently buoyant. It seems inadmissible to sup-

pose that the master, or mate, would not long before this time have discovered and recorded some evidence that the ship lacked the buoyancy which even a vessel carrying 3300 tons of cement should show.

The master was asked the question:

“ At the time that you got as far as the Horn, what evidence had the ship given, if any, of being too stiff, or being too cranky?”

He answered: (*See original record for this answer, which escaped the printer.*)

“ No evidence whatever of being too stiff or too cranky.”

The mate and carpenter testify to the same facts from their own knowledge (*Faraday*, 42, 44; *Milne*, 28, 29).

As to these facts and as to the extraordinary character of the weather, we may quote the language of the Supreme Court used under analogous conditions:

“ In judging of the propriety of her manoeuvres, we are obliged to accept the testimony of her officers and crew as conclusive, since there is no other testimony to contradict it.”

The Umbria, 166 U. S. 409.

Here, then, we have the strongest evidence possible; the positive statements of men competent to judge of the situation, who tell us of what they saw, what their duty, their sense of self-preservation warned them to watch for. They have said they stowed the ship and that she was well stowed. They have said that, until the ship struck storms, she rolled only as all ships roll

which carry a heavy deadweight cargo. The logbook does not contradict their statements. Impliedly, as we have said, it corroborates them in part, and in part it explicitly confirms them.

In *Sumner v. Caswell*, 20 F. R. 251, the court said:

“There was some rough weather; one storm was encountered, but the log gives no indication that it was of an extraordinary character, while the entries *from the first contain almost daily mention of the great crankiness of the ship.*”

Captain Quayle sought, in his direct examination, to make the weather of the voyage the usual experience of those who round the Horn. There seemed to him to be nothing out of the way in the weather, or perils encountered, but even he, finally, *neither asserted the unseaworthiness of the stowage or attributed the damage to the stowage.*

When, on his direct examination, he was asked if there was anything stated in the log, *preceding the date of shifting cargo*, “to warn the master of the *condition of the vessel*”, he answered:

“There is nothing preceding that out of the ordinary
“except to indicate to the master that his vessel was
“*laborsome and needed some cargo lifted from the*
“*lower hold of the ship into the upper part of the ship*
“*to make her more sea-kindly*” (Tr. p. 109).

At the time the cargo was shifted, October 12th, to which date the question referred, the ship had undergone *a terrific experience during twelve days*; water had forced itself below her deck, men had been injured, equipment carried away, the ship hove to, the pumps

could not be reached for sounding purposes and there was no chance even to serve out fresh water! (*Remarks*, pp. 8-15.)

Captain Quayle, in the words quoted, which concretely state his views of the situation, as shown by the log, simply concludes, as the master of the ship concluded, that the sea perils had strained his ship and made her "laborsome". Again, mark Captain Quayle's answer when he was asked by libellant's counsel the crucial question whether the damage

"*might* as well be from the nature of the stowage
"as from unusual conditions of the weather?"

He answered pointedly:

"Now, *understand me*, it *could* be caused by the unusual stowage" (p. 119).

This is not expert testimony that the stowage was bad, or that the damage was caused by bad stowage. Coming as it did, after his cross-examination, we submit that it constituted *an almost complete retraction*. And so, we think the judge below, who saw and heard him, considered it.

This answer does no more than state a doubt. "It might or it might not."

In the leading case *Clark v. Barnewell*, 12 How. 280, the Supreme Court, after expressing the rule that though a loss be shown to have been caused by sea perils, it is still competent for the shippers to show that it might have been avoided by the exercise of *reasonable* skill, said:

“But in this stage and posture of the case, the burthen is *on the plaintiff to establish* the negligence, as the affirmative lies upon him.”

The court approvingly quoted from the summing up of Lord Denman in *Muddle v. Stride*, 9 Car. & Payne 380:

“If on the whole it be left in doubt what the cause of the injury was, or *if it may as well be attributable to perils of the seas as to negligence*, the plaintiff cannot recover.”

Captain Quayle, therefore, in saying that the stowage might have caused the damage, also impliedly said that the sea perils might have caused it.

Captain Steele, after admitting that the ship's master and stevedore are best qualified to judge whether the ship is well stowed, said:

“If a master is appointed on a ship, you must take into consideration the build and everything else and if you go out with a tow, you gain a little experience of knowing her; *a ship kicks sometimes when you don't think it will*” (p. 125).

The stevedore Burke testified to facts which tended to show that the master of the “Musselcrag” did not do what he says he did. His duty, on the discharging of the “Musselcrag” was on deck at the hatch. His whistle controlled the hoisting of a cargo out of the hatch at a rate of discharge which was unprecedented in this port. He did not see the evidence of what the captain said *he did*. The Supreme Court and all of the courts have frequently said:

“What a witness asserts *he did* at the time, or *did not do* on his own vessel, is generally more satisfactory evidence of the fact than the opinions and belief of a dozen others formed from what they saw or heard on another vessel.”

The Neptune, Olcott 495;

N. Y. v. Rumball, 21 How. 382;

The Sea Gull, 23 Wall. 179;

The Wenona, 19 Wall. 57.

At most, a calm interpretation of all of the evidence against the ship is that a doubt arises whether she was in *perfect* trim, and the correctness of this judgment must depend on the fact whether the libellant's witnesses had correctly gauged the build and character of the “Musselcrag”, which they had never seen. This opinion of her trim, as we read their testimony, cannot be accepted as positively asserting that the seaworthiness of the vessel was affected. On the other hand, it is not decisively stated as the opinion of all of the witnesses that sea perils did not cause the damage.

The court below, which heard these witnesses, did not credit their extreme views. On all the facts, it found that reasonable care and skill had been used in the stowage. If this finding was only the resolving of a doubt in favor of the ship, it was justified by the decision of the Supreme Court already quoted.

Expert testimony is not a safe guide against the unimpeached evidence of a witness who asserts what he knows, because he did the thing. It is easy to

criticise. We all know that an expert is an advocate of the views of the party who calls him.

“It is pleasant, when the sea is high and the tempest is raging, to behold *from afar the danger of another.*”

Thus wrote the Latin poet, *Quintus Curtius*, as recollection of the reading of boyhood's days brings back his words. The ardor of the witnesses on behalf of the libellants is not harshly described in them.

We believe that we have laid before the court enough of the facts and of the character of the testimony given to justify us in saying that the weight of the evidence is not that the “Musselcrag” was unseaworthy or that unseaworthiness was the cause of damage. The direct evidence of master, mate, carpenter and all who testified in the ship's behalf shows overwhelmingly that the efficient cause of the damage was the sea peril which for fifty days threatened the ship's existence.

The silent testimony of the log which for sixty days failed to record straining or rolling, we think is, at least, some corroboration. On the other hand the entries of the damage suffered which invariably is taken by courts *as evidence of the fact of sea perils encountered*, viz.: laboring, straining, rolling, leaking of seams and being hove to, cannot also be taken *as evidence of unseaworthiness*, provided, they are recorded contemporaneously with the presence of hurricanes and overwhelming seas. A single storm of magnitude, if proved, accompanied by the presump-

tion of seaworthiness, exonerates a ship from liability for failure to deliver her cargo in good order. The record of forty storms or of one unintermitted storm of forty days here is written after the record of sixty days of voyage during which no sign appears that all was not going well with the ship. We repeat the statement that, if the ship's trim had been bad, if she had been too deeply laden, the entry of facts showing this to be her condition, must in some form have been made during those sixty days. And if there had been evidence of a lack of buoyancy, is it likely that the master and crew would have attempted to enter the stormiest of latitudes, without doing that which Captain Steele intimated and Captain Quayle said the master should, if necessity demanded, do, viz.: make the ship more "sea-kindly", less "laborsome", by lifting "some cargo from her hold"?

We call the attention of the court to the words of Sir Robert Phillimore:

"If the bad weather had not occurred and the straining had not taken place, the cargo would, I think, have arrived without damage and consequently the proximate cause of the damage must be taken to have been the perils of the sea."

The Catharine Chalmers, 2 Asp. Mar. Cases 599.

It seems to us, that the majority of the court erred in reversing the finding of the court below. The fact that Judge Gilbert could not agree with his brethren and that the judge who heard the witnesses held with us and that, seemingly, the majority of the court overlooked the fact that he had had this advantage, which

was denied to them, embolden us to ask for this re-hearing.

II.

We have quoted from the evidence of Captains *Quayle* and *Steele*, which we read to mean that a ship may leave port apparently in perfect trim and yet afterwards find that conditions, not known at that time, will require a change, in some respect, in the stowage. This seems clear, because no one can tell exactly how a ship will act when she starts on her maiden voyage. So, a master who, as in this case, joins a ship in a foreign port, cannot know her precise character, as regards buoyancy or stiffness. If it be necessary "to lift" cargo or to lower the weight of cargo, if she rolls or shows signs of being topheavy, clearly it is the master's duty to re-trim, as may be necessary. This he should and must do in the "management of the ship".

Such a condition, clearly, does not imply "initial unseaworthiness." Due care in seamanship can remedy the defect, if all that is required is re-trimming. The duty of re-stowage does not arise only when cargo has shifted. It calls upon the master to act before there is danger. Cargo is not jettisoned only as the result of an impending peril. It should be done before the probable peril threatens the loss of all of the adventure.

"If the master does not exercise reasonable skill and judgment *and courage* in sacrificing goods for the benefit of the adventure, the master and the

owner of the ship are each liable to the owner of the goods sacrificed.”

Ralli v. Troop, 157 U. S. 400.

Nonfeasance and misfeasance equally create a responsibility.

Now, it is unquestionably true that goods stowed in a ship's compartment which has an unprotected porthole, through which water breaks in, are badly stowed. The ship is unseaworthy at the common law. Yet, under the Harter Act, if there is no immediate danger at the time of starting, a ship is not unseaworthy in such case because, if the master looks after his ship, he will close up the porthole and avoid loss. Such stowage is not initial unseaworthiness.

The Silvia, 171 U. S. 462.

The case of *Knott v. Botany Mills*, 76 F. R. 584, recognizes that a change in a ship's trim by movement of cargo, if intended “primarily with reference to the “ship and for the benefit of the ship, or with a view “to her sea-going qualities”, though it be a fault, is one in the management of the ship. Clearly, a failure to make a change when demanded by the circumstances would, though a fault at the common law, fall within the protection of the Harter Act. We ask the court to keep in mind that we are presenting the case where the line is closely drawn, not the case where, *clearly*, the stowage is bad and the ship thereby is from the first unseaworthy.

In case of failure to jettison, when conditions require the master to take such action, though this also is a fault, he is nevertheless protected by the Act.

Now, although the Harter Act is inapplicable where unseaworthiness is shown, and although it gives no protection where the damage suffered is due to bad stowage or fault in the custody of the cargo, we submit that the adverse testimony of the witnesses in this case does not show initial unseaworthiness, or unseaworthiness of any kind. The testimony of the shipmasters, as we have said, recognizes that the case must come up in which perfection of stowage cannot be reached, because such perfection can be attained only by a long experience with the ship. In such case, though "due care and skill" have been exercised, the ship may show what Captain Steele calls "kicking". The careful master will recognize this and remedy the fault, as Captain Quayle said it could be remedied, by "lifting some cargo". Stowage is not unfit, nor is the ship unseaworthy, because of the fact that under extreme trial she develops a slight crankiness, or stiffness not anticipated. The remedy is not difficult of application, unless weather conditions forbid. The forty tons jettisoned lifted this ship, although at that time she was carrying a saturated cargo.

The court did not consider the application of the Harter Act to this branch of the case.

We feel satisfied that on further examination of the facts, the court will not find that the weight of the evidence was that the ship was initially unseaworthy by reason of bad stowage.

We regret that we should have to impose upon the court the labor of reading this petition, but respectfully ask consideration of the matters to which it refers.

CHARLES PAGE,

EDWARD J. McCUTCHEEN.

ll.

We hereby certify that in our judgment the foregoing petition is well founded and that it is not interposed for delay.

Charles Page

Edw'd J. McCutchen

Samuel Knight

Proctors for appellants. *ll*

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REPLY BRIEF ON BEHALF OF APPELLANTS.

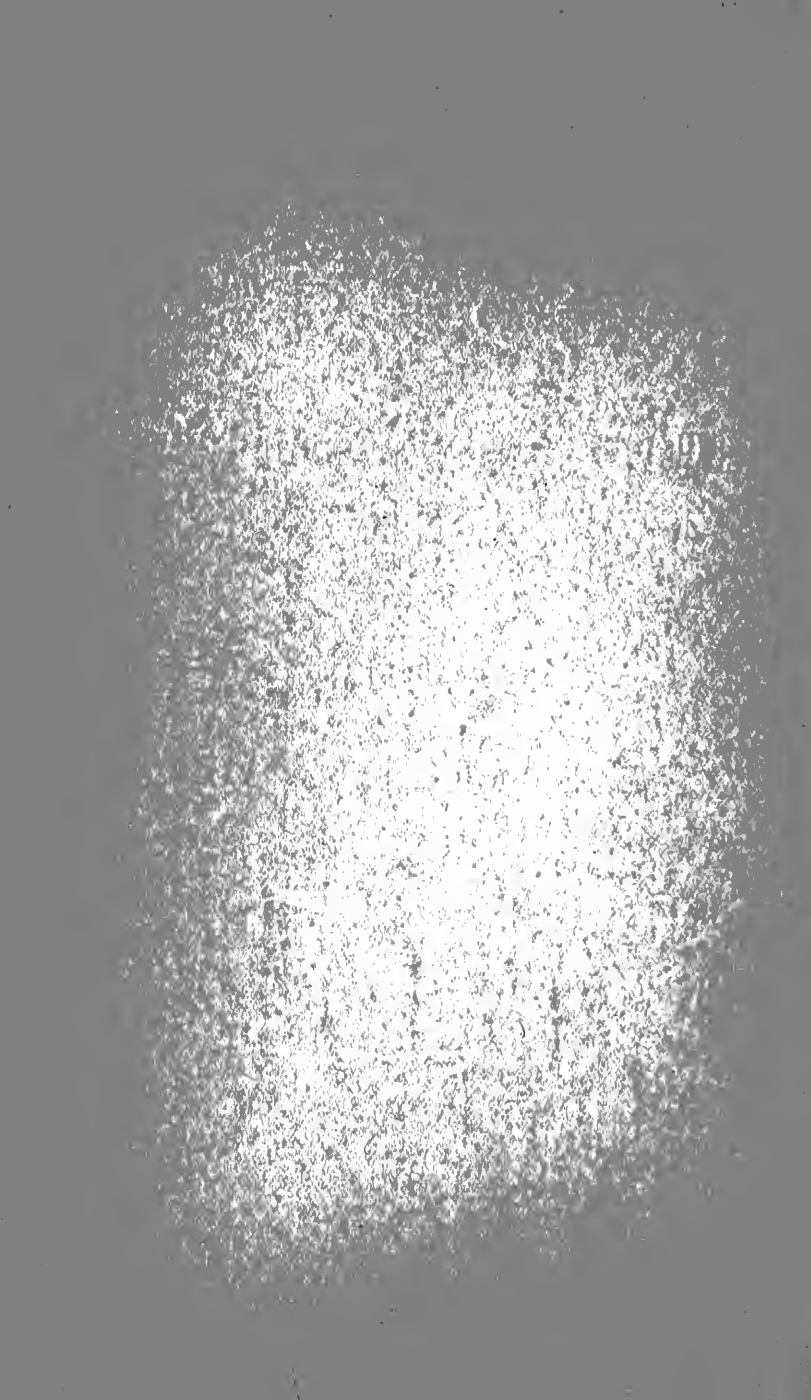
PAGE, McCUTCHEN & KNIGHT,

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REPLY BRIEF ON BEHALF OF APPELLANTS.

On behalf of the “Musselcrag”, we ask the Court to note the fact that the decision of the Circuit Court of Appeals in the case of “The Germanic” quoted from on page 18 of our brief has recently been affirmed by the Supreme Court, which Court has emphasized the correctness of the rule for which we have contended.

In that case, the ship had reached a wharf at her journey's end. She was being discharged. Fault of those discharging caused the ship to lose her equilibrium and topple over and cargo was injured. The Supreme Court held that the fault lay in the failure to do an act with care which primarily was connected with, or affected the cargo, though incidentally it affected the management of the ship. It was held that the ship was liable for its failure in the care of the cargo.

The Court said:

“If the primary purpose is to affect *the ballast of the ship*, the change is *management of the vessel*, but if, as in view of the findings we must take to have been the case here, the primary purpose is *to get the cargo ashore*, the fact that it also affects the trim of the vessel, does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections and if this be true, the question which section is to govern must be determined *by the primary nature and object of the acts which cause the loss.*”

* * * “That ‘in’ which, as the statute puts it, the fault was shown, was not management of the vessel, but unloading cargo; and although it was fault only by reason of its secondary bearing, the primary object determines the class to which it belongs.”

The Germanic, 196 U. S. 597, 598.

This case clearly explains the case of *Knott v. Botany Mills*, 179 U. S. 69, already referred to, in which the acts of stowing the cargo and changing stow-

age were held to be primarily acts in the care and custody of the cargo, although in their "secondary bearing" they affected the ship's trim.

Under these authorities, the right or wrong sailing of the ship, which constitute primarily her management and navigation, fall within the section of exemption provided in such cases and not within the clause creating a liability in cases affecting the care of the cargo. We have nowhere, in our argument, as clearly illustrated the nature of the fault charged against the "Musselerag", or, by illustration, brought her case as positively within the exemption of the act, as has been done by the learned counsel against us. Referring to the crucial feature of the case, the failure of the "Musselerag" to turn back to a port of repair where she could have been restored and made efficient to better care for her cargo, counsel says, on page 44 of his brief:

"It is not the case where the master failed to make use of the appliances furnished by the owner, but it is the failure of the master after his vessel had become unseaworthy, *to do those things which it was incumbent upon the owner to do to render her seaworthy.*"

We ask the Court to note that counsel has well defined the fault (alleged, but not admitted or proved) as the failure to *proceed to a port of refuge and to repair his ship*. He does not *mention cargo*. It was not necessary that he should. The fault, as he charges it, was in the omission to turn back on the voyage, so that the ship might be repaired. To do

those things which "it was incumbent on the owner " to do to render her seaworthy" was to do something which was necessary *in her management*. To do that which was required to get her to the place where such things could be attended to, was to do something *in the navigation*.

Both acts could be done, would be done without a thought upon the cargo, which might or might not be aboard at the time. If both things should be done, the effect, *but in its secondary bearing only*, would possibly react upon the cargo. Their primary object and effect must affect the ship herself. It gives no room for escape from the inevitable conclusion to be reached from the decisions, to argue that because the common law required a master to seek a port of refuge to make repair,

"the act thus required of him was, *therefore*, an act which *should* have been done primarily, if not entirely, for the protection of the cargo, and not at all for the safety of the ship."

In other words it is claimed that the master *should* have turned back, if he had had a prudent regard for the cargo. What he should *have thought of* at any given crisis, how he should have weighed his responsibility, is not the test furnished by the Harter Act to determine liability. We can consider only what he did. If the act done be complained of, as in this case, viz: that he steered his ship to the East, instead of turning back, or that he continued his voyage rather than seek a port of refuge, then the legal inquiry is: "Was " the turning Eastward, or was the continuing of the

“voyage primarily *an act of management or navigation* of the ship?”

The other inquiry is “Was the act done, one which pertained to the care of the cargo primarily?”

In the case at bar, there would seem to be no doubt, that the custody, care, or safety of the cargo was only remotely connected with the act done by the master in deviating in order to pursue his voyage. This act, as the Supreme Court says, had only a “secondary bearing” on the cargo.

Allusion is made in argument to the *Iroquois* case, in which it was held that a ship was liable for failing to put into port in aid of an injured seaman. As the Harter Act does not apply to the relation between shipowner and crew, or passengers, there is no possible analogy in principle between that case and this.

As to the several cases quoted from or cited against us which deal with the common law liability of a shipowner to take all necessary means for the protection of his cargo on the voyage, whether sea perils intervene or not, and when prudence requires it, to seek a port of refuge, we have no reason to combat their correctness. We say, simply, that they do not apply at this day when the rule of the Harter Act has relieved the common carrier from his character of insurer against the master’s negligence in the management or navigation of the ship. If the old rule were now of any avail, every one of the cases, in this country and in England, which we have cited in our

opening brief, all of which relieve the carrier from such responsibility, would have held him to it. At common law, the liability of the ship, in each case, is self-evident. Yet the Courts, in each case, applied the Harter Act and exempted the ship and owner from the claims made.

THE QUESTION OF SEAWORTHINESS.

Criticism is made by counsel of the rule laid down by the lower Court regarding what proper stowage is. We take it that the warranty of good stowage is one thing; what constitutes good stowage is another thing. It is undoubtedly implied in a contract of carriage that the ship shall be fit, but what constitutes fitness depends on a well known rule:

“The duty to supply a seaworthy ship is not equivalent to a duty to provide one that is perfect and such as cannot break down except under extraordinary peril. What is meant is that she must have that degree of fitness which *an ordinary careful and prudent owner* would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. To that extent the shipowner, as we have seen, undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed, the question to be put is, Would a prudent shipowner have required that it should be made good before sending his ship to sea, had he known of it? If he would, the ship was not seaworthy.”

Carver, Carriage by Sea, Sec. 18.

The Civil Code of California defines seaworthiness as the reasonable fitness of a vessel to perform her intended

voyage. Sec. 2682. In the same Code, it is declared that the ship impliedly warrants this reasonable fitness. Sec. 2681.

See *Erle, J.*, in *Small v. Gibson*, 4 H. L. Cases 384.

A fortiori is the rule applicable to a ship's stowage which often is done at a foreign port, often without previous experience by a ship-master of a particular class of goods, or of the effect of such goods upon a particular build of ship. The Court below did not deny the existence of the warranty; it merely defined what good and sufficient stowage is, viz: stowage based upon reasonable care, skill and judgment,—the ship, the goods, the voyage all being considered. A seaworthy ship is, in law, one which has been constructed with reasonable care, skill and judgment out of materials reasonably fit for the purpose. She is not bound to be the best ship in the world of her class, or even equal to the best.

The definition of the lower Court was absolutely correct when it said that good stowage is stowage made with reasonable care, skill and judgment. The ship warrants that it will furnish such stowage, no more. Such stowage, however, is very different from stowage in which the shipowner pleads as an excuse for his ship's instability that he, or his master,

“used all such care and diligence as could reasonably have been expected.”

Sumner v. Caswell, 20 F. R. 249.

The same may be said of the case set out in *The Whitlieburn*, 89 F. R. 526 where bad judgment was exercised in loading a new ship with a light cargo and insufficient ballast. Indeed, in all the cases relied upon by counsel, there was a finding of insufficiency, in the method of stowage. Reasonable skill, care or judgment had not been used. Hence the warranty was deemed to be broken. Judge de Haven simply found *as a fact*, that the "Musselcrag" was not badly stowed, as was charged. There had been no display of bad judgment, of want of care or skill in the loading. Therefore, there was no breach of the warranty.

Thought will, we submit, justify our criticism of counsel's argument when we say that he has read Judge de Haven's opinion to say that the master's best efforts and judgment, though faulty, or his best use of the facilities at hand, if these be insufficient, nevertheless, constitute good stowage. The opinion, certainly, says nothing of the kind. The learned judge correctly defines the obligation of the shipowner or master to exercise reasonable skill, judgment and care; not what is reasonable considering his personal limitations or experience, or the opportunities surrounding him, but what is reasonable in the judgment of men generally who are known to exercise skill, judgment and care. This is the warranty. It can be nothing else, unless perfection be demanded in the attainments of all men engaged in seafaring.

We cannot enter into a further analysis of the evidence in the case. Our opponent finds *here and there*

an expression upon which he bases opposition to our contention, abundantly established, that this ship had a difficult cargo to carry, one that would cause her to strain and roll, by reason of its inelasticity, whether the weather be bad or fairly good; that she was well stowed; that she rode the sea without trouble, or harm to herself, until she struck the region where she met the gales which disabled her and her crew. Thus much stress is laid on the fact that a little putty broke out on the poop, a part of the ship which has no connection with the ship's hold and which is attended to only as a matter of comfort to those who live in the cabin. Again, a few "weeps" in a part of the deck, tears that drop now and again, are magnified into evidence of open seams; the caulking by the carpenter on the main deck on a single occasion during some part of one day seems worthy of large type, though no voyage, good or bad, is unaccompanied by work of that class. The very care which the master bestowed on his decks that cargo might not be injured, seems to be ground for charging unseaworthiness of the ship. We rest upon the log as a complete history. It is amply corroborated by the master and crew.

Respectfully submitted,

PAGE, McCUTCHEN & KNIGHT,
Proctors for Appellants.

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Appellees.

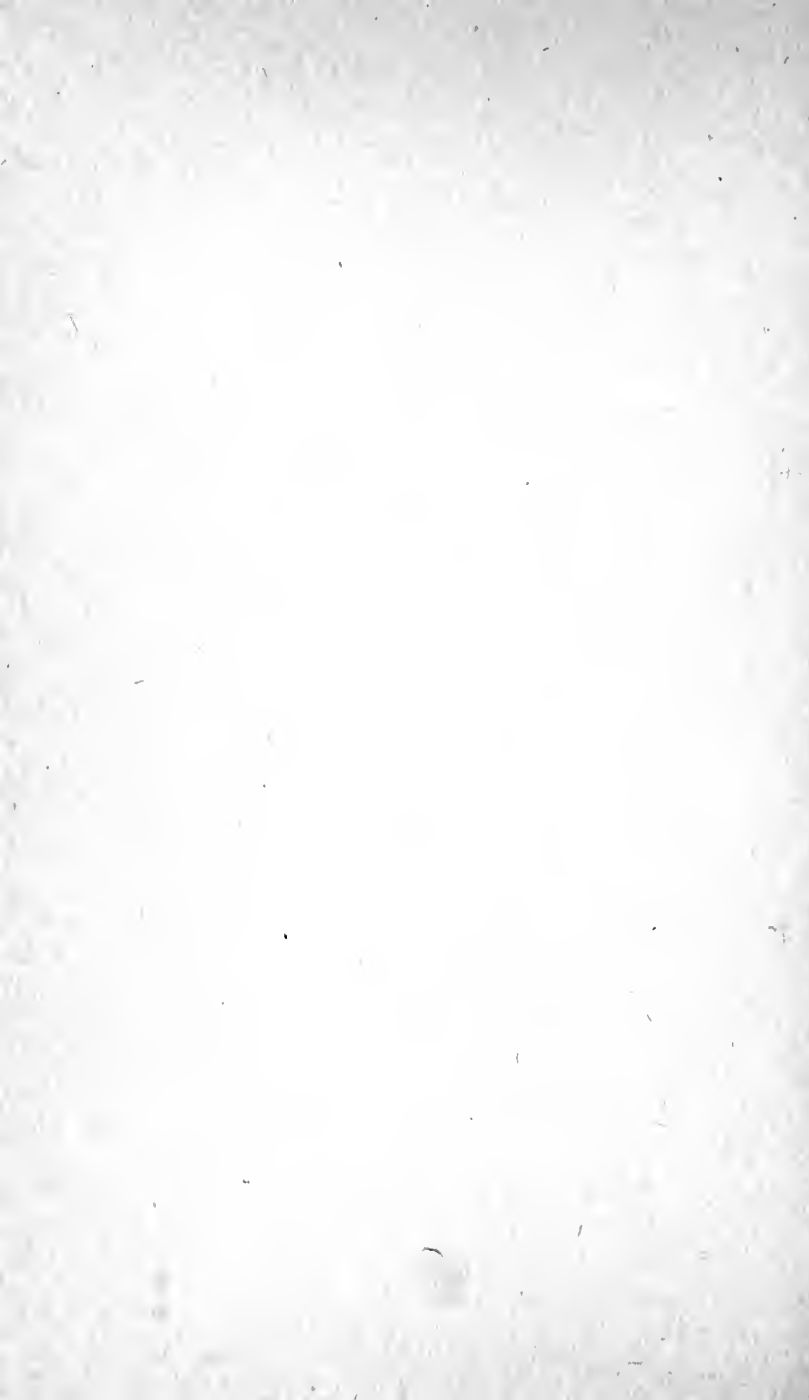
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REMARKS FROM THE LOG OF SHIP
MUSSELCRAG.

SEPT. 11TH, 1899, TO JAN. 12TH, 1900.

NATHAN H. FRANK,

Proctor for Appellees.



No. 1167.

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Appellees.

REMARKS FROM THE LOG OF SHIP
MUSSELCRAG.

SEPT. 11TH, 1899, TO JAN. 12TH, 1900.

"MUSSELCRAG," 1899.

Sept. 11.

P. M. fresh breezes from S. S. W. with bright sky, head sea shipping quantities of water amidships, under top gall. sails. 4 h. making sail as required; midnight moderate breezes, sea going down.

A. M. do. do.

6 h. A. M. started to shifting best sails.

4 P. M. finished all courses, etc.

Sept. 12.

P. M. Very slight breezes. Busy shifting sails.

8 h. variables

9. Steady from N. E.

Midnight do do

A. M. Same throughout.

Sept. 13.

P. M. Light breezes with dull leaden sky

All possible sails set

7 h. Light showers from northward

Midnight more clear

4 h. Lightning to west Wd. almost calms

Calms variables

Sept. 14.

P. M. Commences from southward light breezes

4 h. freshening.

10 h. fresh breezes

midnight tacked ship to S. W.

4 A. M. M. F. T. Gall sheet broke

Repaired same set sail

Heavy jump of head sea

Crew various jobs gaskets, etc.

Sept. 15.

P. M. Fresh breezes, head sea

Shipping water at times

7 h. showers drizzling rain

Midnight do do rather sharp cold

A. M. Moderate sea going down, water discolored Bridge wind

Sept. 16.

P. M. Fresh breezes ship close hauled

4 P. M. tacked ship to eastward

8 h. Breezes freshening, stowed M. F. T.

Gall. sail and O. jib. head sea making

Midnight fresh dull

A. M. Fresh breezes

Stowed top gallant sail and spanker Bridge wind

Shipping water fore and midships

Sept. 17.

P. M. Fresh breezes with head sea

Ship under top sails and mainsail

4 h. more moderate

10 h. Set L. M. T. G. sail and M. T. G. sail

Midnight still heavy sea with S. W. squalls

2 A. M. Set L. F. T. G. sail, jib, etc.,

More moderate

8 h. A. M. Stowed main sail with violent rolling. Bridge wind.

Sept. 18.

P. M. Various light to showers from S. W. ship rolling heavy

4 P. M. Wore ship to westward

Midnight calms and variables

5:30 wore ship weather more mild

8 h. light breeze northerly

Carpenter calking main deck.

Hands securing cargo lower fore and tween decks. Bridge wind.

Sept. 19.

P. M. Light breezes set all possible sail

8 h. fine increasing breeze

Midnight, fresh breezes sky clear and varied clear puffs.

Handed upper stay sails

A. M. Fresh breezes

People at various jobs aloft etc. Bridge wind

Sept. 20.

P. M. Fine fresh breezes all sails set

4 h. Shift to southward wore ship

Midnight fresh breezes tacked ship

Hauled main sail up in gear

8 h. A. M. wore ship strong breeze sea increasing

4 h. A. M. stowed main sail, jibs, etc.

People at various jobs

Rove main clew garnets 27 fms. each 3 in.

Sept. 21.

P. M. light breezes

Dull overcast

6 h. Set main sail and main top gall. sails

Midnight calms etc. heavy dew.

3 A. M. wore ship.

Set all sails; to light breeze and passing fog banks

. 8 h. Fine breezes. Bridge wind

Sept. 22.

P. M. Commences with fine N. W. Breezes and smooth water

All possible sails set

10 h. fine breezes

Midnight handed light S. sails

A. M. fine throughout Bridge wind

Sept. 23.

P. M. commences with mod. breezes, all possible sails set

8 h. fine breezes

Midnight wind hauling to westward

2 A. M. in light stay sail

Day light set all sail

Noon increasing, with very clear westerly appearance

light S. S. in.

Barometer 29.50

Sept. 24.

P. M. Commences with fresh breeze

handed M. T. Gall. sails, jib and spanker

5 h. more moderate

7. Set M. T. Gall sails and jib

10 h. Hard squalls handed top gall. sails

Midnight prudent sail set, fresh gale clear squalls

4 h. A. M. heavy head sea. Ship plunging

shipping water amidships
 Making sail as required
 Noon strong breezes
 Barometer 29.89

Sept. 25.

P. M. Ship on starboard tack. Close
 hauled
 rolling and pitching heavily, under top
 sails and full main sail
 6:30 Wore round to westward
 Heavy sea from westward Midnight sea
 going down wind backing to N. W.
 1 h. 30 A. M. wore round to southward
 Carpenter and sails keeping watch and
 watch
 4 h. A. M. fine steady breezes. Making sail
 Noon, fine fresh breezes to all sail

Sept. 26.

P. M. Fine fresh breezes, handed light
 stay sails, plunging into head sea.
 8 h. Freshing breezes and overcast took
 in top gall. sails, jib, etc.
 Midnight strong breezes
 4 h. A. M. making sail as required
 10 h. 30 All possible sails set sighted the
 high land N. of Staten Island
 Fine smooth water

Sept. 27.

P. M. Fine steady breezes from N. W.
 Hauling out as picked the high land of
 Staten Island

10 h 30 Sighted St. Johns light, bright light bearing S. W. $\frac{1}{2}$ S.

Midnight light bore S. by Standard

2 A. M. Light obscure from view by the land weather, unsettled and puffs off the land, snow capped

5 h. A. M. hard squalls handed M. T. G. sails

Noon Stowed M. sail and lower top gall. sails jib etc. heavy westerly swell

10 h lost sight of land

Sept. 28.

P. M. fresh gale with high sea shipping water amidships

5 h. more moderate, making sail

8 P. M. set main top gall sail

Midnight almost calm, with heavy dew. Still long westerly sea

A. M. do do

5 A. M. Light breezes from N. to N. W. freshing heavy bank to westward

10 h. in top gall sails strong breezes

Barometer 29.80

Sept. 29.

P. M. Fresh breezes. M. sail and top gall, sails stowed shipping heavy water

Ship straining badly, heavy lurches

4 h. Sea going down making sail

8 h. moderate set main top gall sail

Midnight light breezes

A. M. do do

7. Make all sail

Find seams in fore deck leaking, put on tar and oil on seams through straining.

Barometer 29.18

Sept. 30.

P. M. Light N. W. breezes with dull breezy appearance, ship rolling and straining.

4 h. almost calm, fell off to S. E. rolling heavy, and shipping water

8 h. Still to eastward, shortened sail, reefed fore sail, upper top sails set, reefed and stowed main sail

10 h. came to wind at N. W. starboard tack
Ship laying easier

Midnight do do

5 h. A. M. wind freshing ship plunging heavy

8 h. hard squalls with hail. Shipping large bodies of water between the squalls

11 h. reefed M. F. top sail hard gale.

Still laboring and straining heavy

Williams A. B. an apprentice on sick list

A S. W. current at 30 miles per day

Barometer 29.20

Oct. 1.

P. M. Fresh gale, F. T. sail reefed, main full and reefed fore sail

Ship laboring and straining and shipping large bodies of water all over.

4 P. M. Wore ship to N. W. laying easier
Squalls increasing, sea making

P. M. 8 h. to 10 h decks continually flooded
all over

Midnight wore ship to S. W. wind backing

2 A. M. Terrific squalls and increasing
handed M. W. top sail stowed at 4 h.

6 h. all hands stowed fore top sail and fore
sail wind blowing with hurricane force
a continual drift fore and aft

Shipping large bodies of lea water

Decks continually full watch chance to get
fore and aft

All attention paid to ventilators secured
and battened down

Weather too bad to sound pumps, watching
chance.

Williams A. B. still sick also apprentice
Whim

Oct. 2.

P. M. Still continues hard gale, ship un-
der close reefed top sails, fore and mizzen
sails, decks continually flooded, shipping
large bodies of water fore and aft

Midnight sea running more true

Ship lying easier

A. M. terrific squalls sleet and snow

Several Od. ships in company all reaching
under small canvas

Same water in well as previous to weather
Williams and apprentice on sick list

Barometer 28.80

Bad weather

Oct. 3rd.

P. M. Gale from N W. still continues.

Ship laboring heavy, high sea from the Wd., shipping large bodies of water.

8 h. terrific squalls

More moderate to fine appearance

2 A. M. set reefed fore sail

A. M. Set the fore stay sails to steady the ship.

Put reefs in M. M. top sail and stowed sail.

Noon. Dull threatening appearance.

Bar. 28.50.

Oct. 4th.

P. M. Ship still on starboard tack with close reefed top sails and reefed foresail with heavy roll of sea, sky dull and leaden.

Ship rolling heavy and straining.

Shipping large quantities of water.

4 h. Stowed foresail.

7 h. Shift of wind to S. W. wore ship decks full of water

In jibing the spanker boom over the guy unhooked and almost instantaneous the boom took charge, she came adrift, the boom snapped in midships, falling on deck.

Mr Fariday, 2nd mate, was caught in the fall, and received injuries, thought at first to be serious.

2 A. M. Gale started afresh, tremendous sea.

8:30 The starboard fore top sail sheet broke.

All hands out. Sail split, stowed the sail. Ship lying easier.

Using oil from starboard forward and aft closets in all about 4 gals.

Damage done, from spanker boom breaking, steering wheel, steering gear case poop bell on same. Starboard rail sprung. Ladder to top of chart house broken. House badly chaffed with bangs and guys. Out halls guys, etc, cut and broken.

Several blocks missing and capstan bars.

Hove to

Drove 30 miles to Eastward.

Barometer 28.40

Oct. 5th.

P. M. Ship still hove to on port tack.

4 h. Moderating a little set reefed M. W. Top S.

6 h. Set reefed fore sail, F. & M. T. M. S. S. sails

11 h. Gale again increasing, shortening sail

4 h. All hands stowed fore sail

Heavy drift snow and sleet.

Ship laying off the sea dangerous to get fore and aft—tremendous bodies of water falling and breaking on board.

The W. M. top sail down haul carried away through the heavy lurching, lashed the two yards together.

Short of fresh water. Cannot get to F. Water tank.

Continuous outlook from poop all the watch on poop

Barometer 28.50

Oct. 6th.

P. M. Ship still hove to on port tack. laboring and straining badly; shipping large bodies of water.

Galley and deck houses continually flooded 8 h. A little more moderate, but wind backing more Northerly

Barometer 28.40

Heavy bank of clouds round from W. to S. W. dew falling like rain.

2 A. M. Gale again increases with terrific force. Ship laboring and straining. Decks continually full of water.

No chance to serve our F. water yet.

Second mate, Williams, apprentice sick list
Ship driving about E. N. E. 30 to 35 miles per day.

Watch on poop deck.

Barometer 28.60

Oct. 7th.

P. M. Gale still blows with same violence.

and ship struggling to keep decks free from water

Still on port tack

4 h. 30 Got out some 3 buckets of F. water, set F. & M. top S. sails.

6 h. Got out sufficient fresh water.

Set fore sail reefed.

Midnight still continues do do

5 A. M. More moderate

Barometer 29.

A. M. Sent down L. F. top sail

8 h. Bent 2nd sail, set reefed top sails, jib, etc.

Sea and wind considerably gone down, after general overhaul gear badly chafed through deck wash and being taken overboard through ports

Pumps lights lookout carefully attended Hansen, Williams, Bos'n from std. watch 2nd mate and apprentice laid up sick

Watch from poop deck constant

Oct. 8th.

P. M. Ship still on port tack sea more moderate making sail to top sails still fresh gale

Barometer rising 29.50

Midnight do do

A. M. Sea quiet moderate breezes

Find wing from figure-head gone

2nd mate and Williams and bos'n sick list.

Hansen and apprentice returned to duty.
Still lookout from poop.

Oct. 9th.

P. M. Port tack, weather moderate
Ship under top sail, reefed courses
4 h. Wore round to Sd.
Dull & mizzling at times.
Midnight do do
Got remains of s. boom on deck and cut
up into fender lengths
2d mate, bos'n and Williams, A. B. still
sick list.
Noon moderate dull and overcast.
Find that a considerable quantity of s. wa-
ter had gone down fore hold through the
decks.

Oct. 10th.

P. M. Moderate breezes and sea
Ship on starboard tack under full top
sails and reefed courses.
6 h. Dull and mizzling rain.
Midnight do do with fog
5 h. A. M. Sky lifting at times.
8 h. Making sail to main top gall. sail
Sea making from Wd.
Prudent sail set.
Breeze increasing sea. do. do.

Oct. 11th.

P. M. Dull heavy appearance, with
quick jump of sea from westward. Ship
under main top gall sail.

4 h. Breeze increasing rather quickly.

Shortened down

5:30 called all hands, and took in main sail and W. top sails

Continuous seas breaking on board and flooding the decks fore and aft.

11 h. Sea broke on quarter deck, and smashed the chicken coop to leeward breaking the legs and gutting out.

2 A. M. falling off, rolling terrific decks full of water

Ship straining badly, wind going down and leaving the sea.

6 h. More moderate, set main top sail
Weather clear, people variously employed repairing damage to gear, etc.,
Carpenter looking over cargo fore and aft

2 mate, Bosn. and Williams A. B. sick
Noon set reefed main sail

Oct. 12th.

P. M. Ship on starboard tack under whole top sails, reefed courses.

10 h P. M. Snow showers—sea making
Midnight do do

A. M. Squally and showers of sleet and snow

Hands employed shifting cargo from fore part of fore hold, and raising part into tween decks and shifting cement further aft, and higher in the ship to ease the pitching and straining.

Bosn, returned to duty.

2 mate and Williams still sick.

Barometer 29.20.

Oct. 13th.

P. M. Fresh gale, ship on starboard tack with increasing squalls

1 h. 30. The Bee of outer jib stay carried away, secured the sail and stay.

2:30 The inner jib stay carried away, called all hands, secured the sail and stay, and took in upper top sails

squalls blowing with terrific violence.

8 h. Stowed main sail.

10 h. Shift to S. W. Ship rolling heavy and filling the decks fore and aft, all hands out wore ship, rolling terrible.

Midnight more moderate sea going down making sail

3 h. Set W. top sail, fore sail and main sail etc. Sea quiet, little wind.

A. M. Set up outer J. stay with fresh block bent sail, cut down from mast head the inner stay, which broke about 10 ft. above bee, on boom a long regular break looks much like a splice in the first place Replaced good M. top sail halliards

2 Mate and Williams sick.

Bar. 29.30.

Oct. 14th.

P. M. Ship on port tack under top sail full fore sail and reefed main sail.

4 h. Breeze increasing.

8 h. Reefed fore sail and stowed main sail.

Gale increasing with hail squalls.

Midnight stowed upper top sail; hard gale, which continues.

Ship laboring and straining, shipping large bodies of water all over.

A. M. Still continues hard gale.

Noon. Much increasing to high gale.

2 mate Williams sick.

Oct. 15th.

P. M. Gale increasing, bad threatening appearance, took in main sail and fore sail.

2 h. Terrific squalls, the lee main top sheet carried away while securing the main the fore top sail went to pieces at once; the lee main lift also carried away—secured the yard later the mizen S. sail went to pieces, Ship now under bare poles tremendous sea running, using oil from lee closets, about ten gallons.

Midnight, no abatement, ship struggling to free herself of weight of water on deck.

Port main top mast back stay gone, at shackle

2 A. M. Terrific sea broke on the ship at fore rigging taking the 2. boats with all gear attached—from forward skids;

the gale broke again with hurricane force, with a clean drift.

8 h. Still continues; port forecastle door stove also the galley door, places flooded. Got remains of mizzen S. sail unbent ready to bend afresh stay sail, i. e. the 2nd one.

2nd mate Williams sick.

Lookout from poop deck running.

Oct. 16th.

P. M. High gale still continues without taking off decks still flooded and ship straining badly.

8 h. Hard squalls but decreasing after

9 h. Remain. of main top sail down bent mizen stay sail set main sail reefed.

Midnight, wind taking off—but a tremendous sea running.

People busy clearing up aloft F. top sail, etc.

A lot of gear chewed and chaffed.

5 h. The high land at back of C. Horn in sight, wore ship with reefed F. sail under great trouble, decks full of water and people generally being knocked down.

8 h. A. M. bent F. top sail and stowed same.

Noon, sent up new L. M. top sail.

Find the starboard bulwarks started inward from F. house to main hatch.

Seams along the main deck open bad.

Busy repairing damages generally.

Cape Horn in sight W. S. W. dist. about
12 miles.

Lookout on poop deck.

Oct. 17th.

P. M. Ship on starboard tack bent and set the F. and M. lower top sails, and reefed fore sail replacing gear as required.

6 h. 30. The gale again started by 8 o'clock blowing with terrific force, clean drift, stowed fore sail.

Midnight still keeps on with hurricane force, tremendous sea running.

4 h. do. do. hail and snow in squalls. People standing by all the time.

Find rivet on port forward skid broken rail started.

No fresh water served out to day—no chance.

Lookout on poop all the watch.

Oct. 18th.

P. M. Ship still on starboard tack under lower top sails and lower S. sails with gale from W. S. W. and heavy sea running, shipping large bodies of water. Midnight do. do. with snow and sleet in the squalls, bitter cold.

A. M. Inclined to break off, bringing the sea more abeam.

7 h. 30. All hands out wore ship, under lower top sails.

Noon. Still dull overcast sky, squalls not quite so severe.

Set reefed fore sail.

Fitted port up, top, down haul wire $2\frac{1}{4}$.

2 Mate Williams A. B. sick.

Bar. 29.50.

Lookout on poop all the watch.

Oct. 19th.

P. M. Ship on port tack fresh gale heavy head sea.

2 h. Set fore sail reefed, and reefed M. S. sail.

Weather looking better. Bar rising.

Midnight do. do. Squalls taking off.

5 h. Sighted the high land at the back of C. Horn again.

8 h. All hands wore ship.

Set in with sleet and mizzling rain.

No sun to-day, this is just miserable the ship tumbling about between the squalls with the decks full of water most of the time.

2 Mate sick.

Williams still sick.

Fitted new wire main top S. clew lines 16 fms. each $2\frac{1}{4}$.

Bar. 29.50.

Lookout on poop running.

Oct. 20th.

P. M. Ship starboard tack with fresh gale and squalls of sleet and snow.

Miserable weather, ship under reefed main top sail, and reefed F. sail.

Laying open to sea.

Midnight. Wind more northerly—set reefed fore top sail.

A. M. do. do. Still wet miserable weather.

7 A. M. set reefed main sail.

Dull threatening appearance, heavy swell coming along from the westward.

People at various jobs under cover.

Noon. Heavy gale struck the ship, all hands out.

2 Mate, and Williams still sick.

Bar. 29. falling.

Lookout on poop running.

Oct. 21st.

P. M. Commences with living gale from N. W. All hands out shortened sail to close reefed top sail.

3 P. M. The mizen S. sail blew to pieces in terrific squall.

Sea running high and choppy. Shipping large bodies of water.

No water served out.

8 h. P. M. still blowing with increased fury, ship laboring and straining.

Watch below standing by handy.

Midnight do. do.

4 h. A. M. Found ventilator cover unshipped (on F'd house) broken, recovered the same with canvas sea water going down.

A. M. Gale taking off, sea still running high, kept ship off to get out fresh water, $\frac{1}{2}$ hour.

Crew various jobs unbending and shifting torn sails.

2 Mate and Williams A. B. still sick.

Apprentice Rogers do.

Bar. 28.50.

Lookout on poop running.

Oct. 22nd.

P. M. High gale still continues from S. W.

Noon wore ship with all hands. Ship laying easier, unbent storm spanker and remains of mizzen S. sail.

4 h. Setting lower stay sails to steady ship.

5. Set reefed main top sail.

7. Set fore sail.

8 h. Gale again increases with violence. All hands out put ship under close reefed top sails again, stowed fore sail.

Midnight, snow and sleet squalls bitter cold.

A. M. do. do.

6 h. Sails finished holes in storm

spanker bent same for mizzen stay sail,
bad fit.

Making sail as required, wind falling
light sea going down dry overhead.

Sunday, etc.

2 Mate, Williams A. B. sick.

Drift of 24 miles to northward.

Bar. 28.80.

On poop, all the watch.

Oct. 23rd.

P. M. Moderate gale from S. W. Ship
under reefed top sails, and reefed courses,
still heavy westerly swell ship rolling
heavy, on port tack.

6 h. Heavy showers of snow laying on
deck inches.

8 h. Stowed main sail. Caught aback
wore round starboard tack.

Midnight dull threatening stowed F.
sail.

3 A. M. Wore ship to northward.

8 h. Set foresail and lower stay sails,
bright appearance at times.

Hove off starboard fore brace and re-
paired the port main do.

Busy fitting I. jib stay from stay and old
pendant.

Carpenter repair wheel.

Williams sick.

2 Mate at duty.

Drift of 30 miles to N. N. E.

Bar. 29.20.

Lookout on poop running.

Oct. 24th.

P. M. Ship on port tack under reefed top sail.

Wore ship to southward on starboard tack with fresh gale sea much smoother, and squalls of hail and snow bitter cold.
8 h. do. do.

11 h. Wore ship to port tack to N. W. still hard squalls.

2 A. M. Set reefed main sail.

5 h. Shifted main top sail halliards old one badly cased.

11 h. Breeze increasing fast very cold raw weather.

Noon Wore ship to southward starboard.

Main sail ship laboring and straining.

People various jobs under cover.

Lookout on poop running.

Bar. 29.50.

Oct. 25th.

P. M. Gale commences at once with renewed force.

4 h. All hands put ship under close reefed top sail, high dangerous sea running, shipping large bodies of water. No fresh water served out.

Midnight blowing clean drift snow and sleet.

Watch standing by, poor chance to get fore and aft.

Wind backing more southerly.

A. M. Cook laid up. Huxley A. B.
Breimer A. B. Williams A. B.

Chuinie in galley.

4 h. hands from P. watch.

5 A. M. Still blowing hard gale, ship laboring and straining badly, all houses on deck flooded, short of water for dinner.

Fore hold and tween decks fair flooded, pantry with 3 in. of water inside laying in tween decks.

Must have had large quantities of water below through the seams.

All the watch on the poop.

Summary of gear, blocks, sheaves and cabin stores lost, broken and carried away or otherwise destroyed by the recent heavy weather.

We have passed through with particulars of length and sizes.

Carried away with working of masts:

2 lower top sail clewlines $13\frac{1}{2}$ fms—each $2\frac{1}{2}$ flexible wire.

1 do. fore 13 fms do. do. do.

Port M. U. top sail down haul 18 fms $2\frac{1}{2}$ do. do.
To 15 fms. fish pendant $3\frac{1}{2}$ used for Inner Jib stay.

To 10 fms. $2\frac{1}{2}$ lanniard flexible I. jib stay.

13 fms. I. jib sheet whips $3\frac{1}{2}$ Manilla.

18 fms. $2\frac{3}{4}$ I. jib halliard whip, 19 fms $2\frac{1}{2}$,
O. I. Halliard whip.

2 fore braces 147 fms. $3\frac{1}{2}$ each Manilla, Cut and
Stranded washed overboard.

2 Upper fore top sail braces 47 fms. each $3\frac{1}{4}$
Manilla (replaced twice Working of mast).

Fore top sail halliard 62 fms. 4 in. Manilla.

Main top sail do. 49 fms. 4 do. do.

Fore and main top gallant halliard 45 fms. each
 $3\frac{1}{4}$ Manilla (Chafed with working of masts).

2 Main braces 45 fms. each $3\frac{1}{2}$ Manilla.

2 new fore tacks 14 fms. each $2\frac{1}{2}$ flexible wire.
Chafed broken working of masts.

2 coils spun yarn 1.2 yarn 1.3 ply or yarn (used
on gear and sails). Lost sail at same time.

(Mizen stay sheet pendant 5 fms $2\frac{1}{2}$ plain wire
double and single 10 in.

(Blocks, hooks and thimbles 13 fms. $2\frac{3}{4}$ whip
for same Manilla.

Main top mast S. sail sheet wire $2\frac{1}{2}$ —5 fms
double and single 10 in blocks.

12 fms. $2\frac{3}{4}$ whip for same hooks and thimbles
(washed overboard).

1 iron jib block 8 in. to carry 3 in. wire, Outter
jib stay broken lost.

1 iron lead block broken O. J. stay to repair
8 large capstan bars.

1 large shackle P. main top mast back stay 6
deck buckets.

6 galvanized sheaves $10+1\frac{3}{8}$ patent top sail braces.

Rove off, Fish tackle fall 65 fms. 4 in. Manilla for fore top sail halliards.

4 galvanized sheaves 6 in.+ $1\frac{1}{8}$ patent 6 top sail sheet shackles.

6 pair large clip hooks, 1 doz. galvanized thimbles.

1 doz. large stay hands, 2 doz. medium sizes.

12 galls colyr oil 5 gall raw oil 3 kerosene.

Bread cabin 2 cwt.

Bread crew 4 cwt.

Sugar 2 cwt.

Rice cabin 2 cwt.

Tea cabin 28 lbs.

Flour do. 5 cwt.

Beans crew 2 cwt.

Oct. 26th.

P. M. Ship still on starboard tack with gale from S. W. still continues. Ship laboring and straining badly, decks still flooded fore and aft.

Mizen stay sail badly chafed through being washed adrift from lashings.

Very short of fresh water.

Crew no tea

Could not get to the pumps.

8 h. More moderate wore ship to westward under small sail.

10 h. Ship laying more comfortable, sea going down

Midnight do. do.

Cook returned to duty.

5 h. Served out fresh water, setting reefed M. top sail.

8 h. Took F. and after hatches off, find the cargo saturated with water, through the excessive straining of the ship and decks.

Sounded well at 2 in. also Fd. water tanks and find 2 ft. 4 in. and 6 ft. P. side.

About 9 weeks supply.

Williams, Breiner and Huxley, A. Bs. sick.

Noon, bright and clear land in sight.

Staten Island after 31 days.

Lookout from poop deck running.

Bar. 29.50.

Oct. 27.

Staten Island in sight, light S. W. breezes, sea smooth, ship under small sail. Reefed M. top sail, P. tack.

After grave consideration, and consultation with officers, and tradesman, re the damage done to the ship since September 26 to date, and the continuous gales of wind and storms encountered, and the state of the ship generally, settling down with the constant leakage through the decks after the great laboring and straining, decided to throw overboard from the ends of the ship, fore and after hatches about 50 tons in all.

A start was made at noon with all hands at F. hatch, and 440, 220 in all R. A. wet casks taken up.

5 h. Weather threatening started aft hatch and put out about the same amount.

8 h. Secured the rest of the cargo below, and battened down, wore ship to the S. W. Set sea watch again.

Midnight set reefed fore sail and lower stay sails sea smooth, dull breezy appearance.

A. M. People generally repairing chafed gear about the decks and sundry jobs, etc.

Noon the inner Jb. B. block again carried away, secured sail and stay.

Hansen and Williams sick Breiner returned.

Lookout from poop deck running.

Bar. 29.40

Oct. 28th.

P. M. Ship on starboard tack with freshing gale Ship under top sails and reefed M. sail.

3 h. Stowed stay sails etc., F. top sail

4 h. All hands stowed main sail. Fresh gale.

8 h. Hard squalls rain and sleet.

Midnight do. do.

2 h. Sea making.

5 h. A. M. prudent sail set.

A. Bs. Foster, Hansen, Williams still sick.

Weather bright at times but hard squalls. Some 25 to 30 miles easterly drift.

Lookout on poop running.

Bar. 29.30

Oct. 29th.

P. M. Ship on starboard tack standing to southward under close reefs and reefed foresail with high gale and considerable sea running occasional seas coming on board.

6 h. Strong squalls dull laden sky looks set in.

Midnight do. do. ship rolling heavily straining aloft.

3 h. 30 all hands wore ship to westward bowing the sea laying easier. Making prudent sail.

Noon top sails set and reefed main sail

Westerly sea still continues.

Foster, Williams sick, hansen returned.

About 30 miles easterly drift.

Lookout on poop running.

Bar. 29.60

Oct. 30th.

P. M. Ship on port tack under top sail and reefed main sail, with fresh westerly gale and heavy sea, at times ship rolling and straining heavy, flooding the decks.

8 h. More westerly stowed main sail.
 Midnight wore ship to S. W. sea going
 down dull breezy appearance.
 5 h. high land in sight to northward.
 Sunrise wild and firey, gale again start.
 Put ship under close reefed top sails.
 Noon hard gale high sea do. do.
 Williams on sick list.
 Breiner taking wheels.
 Drift of 24 miles easterly.
 Lookout on poop running.
 Bar. 29.50

Oct. 31st.

P. M. Still continues fresh gale with
 high sea, ship rolling heavy, straining
 badly aloft, filling the decks at times, un-
 der close reefs, starboard tack.
 8 h. Dull heavy bank to westward.
 Midnight more moderate sea going down
 Set fore sail and lower stay sails.
 A. M. do. do.
 8 h. Took off after hatches, and secured
 the cases from aft part more forward.
 Several hands sending up I. jib stay, etc.
 Carpenter overhauling below.
 Sails at Mizen S. stay sail.
 Drift of 24 easterly.
 Running lookout.
 Bar. 29.50.

Nov. 1st.

P. M. Ship on starboard tack under reefed top sails.

4 h. Bent and set inner jib.

10 h. Squally, ship laborsome Stowed M. fore top sail.

Midnight do. do.

4 h. A. M. Wore ship to N. W. making necessary sail.

People at various jobs, bent O. jib and stowed the sail.

Noon strong breezes prudent sail set.

Carpenter aloft, at outriggers sails at mizen S. sail.

Running lookout.

Bar. 29.50

Nov. 2nd.

P. M. Ship on port tack under reefed top sails.

4 h. Wore ship to southward stowed F. top sail.

3 pts. and hauled main sail in gear.

7 h. set main sail.

Midnight, set F. top sail hard gale squalls sleet, westerly, sea making. Ship pt

5 A. M. hard squally stowed M. F. top sail and jib.

8 h. Making prudent sail.

Noon all hands stowed main sail.

Shipping much water hard squalls heavy
lurching aloft.

Crew various jobs mizen S. S. pendant
sheet, etc.,

Williams taking wheel, and Breiner, Ask A.
B. sick

3 from P. watch.

Running lookouts.

Bar. 29.50

Nov. 3rd.

P. M. Fresh gale with hard squalls high
sea, shipping much water, straining badly.

8 h. Wore ship set lower stay sails jib.

Midnight set main sail.

A. M. Dull drizzle, wind backing again

Westerly ship rolling heavy.

6 h. A. M. All hands wore ship.

Mizzling rain laying easier.

Noon stowed main sail jib and M. S. sail.

People various jobs under cover.

Williams and Breiner Ask, A. B. returned.

Foster sick A. B.

East current 20

Running lookout.

Bar. 29.70

Nov. 4th.

108 days outgoing East.

P. M. Ship on starboard tack, reefed top
sails main sail stowed, rolling about and

filling the decks, sea running in both ways from N. W. to S. W.

4 h. do. do. doing no good.

6 h. tremendous rolling and fearing the masts put the ship off before the wind, and the ship doing no good as shown from former positions, decided to run east by Cape of Good Hope.

Ship going away with much less water on deck.

Day light still rain and thick set full fore sail.

10 h. Set stay sails wind hauling.

Running lookout.

Nov. 5th.

P. M. Ship under reefed top sails.

Wore stay sail, heavy roll of westerly sea.

Dull drizzling rain miserable weather.

Midnight fresh breezes.

A. M. Wind hauling to S. W.

8 h. Set full M. top sail and lower top galleant sail.

Noon dull calms, drizzle, fog, miserables, plenty rolling.

Foster A. B. sick.

Nov. 6th.

P. M. dull miserable wet, thick, rain, fog.

Wind round to N. E. ship rolling heavy straining aloft.

6 hauled fore sail in gear.

8 h. Light breezes from S. W. ship steady.

Midnight. clearing up, only showers.

A. M. Fresh breezes making prudent sail.

People at various jobs.

Noon full top sails set. F. sail full.

Foster sick, strong breezes.

Running lookout.

Bar. 28.90

29.20 rising.

Nov. 7th.

P. M. Commences with fresh gales from N. W.

3 P. M. All hands out stowed jib and M. F. top sail

4 h. Set reefed main do.

7 h. Hard squalls stowed jib and stay sails

9 h. Set stay sails and jib.

Midnight dull mizzling appearance

1 h. Set full fore top sail.

5 h. A. M. stowed M. top sail jib and lower stay sails.

8 h. A. M. all hands reefed and set fore sail hard gale from N. W. with much rain.

People variously employed.

Foster still sick.

Running lookout.

Bar. 29.50

Nov. 8.

P. M. Strong gale from N. W. Ship on P. tack reefed fore sail and close reefs.

4 h set reefed top sails heavy beam sea

8 h. Squalls still severe with hail.

Midnight. Slight shift to S. W. set full fore sail

3 A. M. Set main top sail.

A. M. Making sail.

People various jobs. Took fresh water casks on poop deck ready to save water.

Had fore hatches off; tween decks and hold looks much better.

Foster still sick

Running lookout

Bar. 29.50

Nov. 9.

P. M. Fresh breezes set lower top gall sails jib & stay sails

8 h do. do.

11 h. Stowed stay sails & jib—dull haze

Midnight do. do.

3 h. A. M. Stowed L. T. Gall Sails, 4 h. hour All hands stowed mail sail—thick fog—strong breezes

8 h. Reefed M. F. Top Sail in setting the halliards carried away—rove off new rope—set sail

Noon still fog no observations this day

Lookout day and night continues for Ice much too cold for this Lat. Fog horn going

Bar. 29.50

Nov. 10.

P. M. Strong breezes ship under top sails
Mail sail stowed, Fog still continues

4 h. Fog lifting dirty mizzling appearance,

Sea rolling up from N. W.

7:30 Bad appearance, heavy to N. W. put ship under close reefed top sail

8 h. Stowed fore sail

Midnight suddenly gale broke with terrific force

Ship laying right down with only close reefs
Continues till 2 A. M. leaving a tremendous sea, breaking at times.

4 h. A. M. Sea still wicked

Shipping large quantities of water fore and aft

Ship laboring very badly, laboring to such an extent that we are afraid of our masts coming down.

Feel sure that the cargo in lower hold must have broken adrift, and settled down during the heavy weather we experienced off Cape Horn.

The constant flooding of the decks has not as yet allowed us to fully ascertain the condition of the cargo in the lower hold.

5 A. M. Wind taking off set fore sail and stay sails

Noon top sails set. Sea taking more true.

Running lookout

Bar. 29.20

Nov. 11

P. M. More moderate. Ship under top sail & full main sail

5 h. Set jib & L. M. T. Gall sail

Ship still rolling heavy and straining aloft.

Midnight do. do.

5 h. A. M. Set up main top mast & top gall back stays both sides.

Set all sail

People various jobs general clearing up.

Noon fine pleasant day first fine day for nearly 2 months

Foster again at duty.

Bar. 29.60

Nov. 12

P. M. Ship under all sail.

Sea still keeps up ship rolling considerable heavy swell from N. W.

Midnight wind falling light sails banging about hauled up M. sail and stay sails.

AM Calms

4 h. do. do.

8 h. Falling off in sea, rolling tremendous courses hauled up

Heavy strain on masts and rigging

Running lookout.

Nov. 13

P. M. Calm airs and variables

8 h. Light airs from N. E.

Light flimsy clouds passing over from Eastward

Midnight Light to puffy breezes

all stay sails in. Sharp on wind

3 AM Wore ship to N. W.

8 h. Wore ship strong breezes

Reefed and stowed main sail

Noon Stowed Fore top sail

fresh gale from Eastward

Cold raw weather dirty appearance

Hands working ship shortening sail

Running lookout

Bar. 29.40

Nov. 14

P. M. Noon Reefed and set F. top sail

Ship on port tack

Strong gale from S. E. bitter cold, snow and sleet

3 h. Stowed M. Top Sails fair blinding

4 h. hard gale Stowed fore sail with all hands

6 h. do. do.

Midnight clearing up to S. W.

1 h. AM. Squared yards to course wind from S. W. and making sail

Sea running cross ship rolling and tumbling about

Shipping quantities of water

8 h. had top sails set full fore sail

Noon. Main top gall sail
 People working ship
 Foster again laid up
 Running lookout
 Bar. 29.50

Nov. 15

P. M. Ship running with M. Top gall sail
 Heavy westerly sea rolling up
 4 h. Set fore top gall sail and stay sails
 Wind veering to N. W.
 10 h. Freshening stowed O. J. & F. T.
 Gall sail
 Midnight fresh gale with squalls Stowed
 Main Top gall S.
 Wind N. W. hard gale
 1:20 all hands out close reefed top sails
 high gale choppy sea breaking on board all
 over
 4 h. AM. All h. stowed fore sail ship going
 with less water on deck
 Wind hauling keeping ship head to sea to
 Northward to save shipping heavy water
 People generally working ship
 running lookout
 Bar. 29.40

Nov. 16

P. M. 1 h. Squared away to Eastward
 Keeping ship before the sea and making
 prudent sails hard squalls from S. W. with
 heavy sea on

shipping large bodies of water
rolling and straining badly.

Midnight Set lower main top gall. sail
fine steady breezes

A. M. Set prudent sail reefed main sail
jib etc

Main Top gall sail

Fine following sea, still shipping plenty of
water.

People variously employed aloft
weather gets more genial

running lookout

Bar. 29.60

Nov. 17

P. M. Fine fresh breezes ship running
with main top gall sail and reefed main sail

10 h. Set fore top gall sail

Midnight fine breezes

A. M. All possible sail set

Hands variously employed aloft

Fore hatch off

Foster still sick

Following lookout

Bar. 29.90

Nov. 18

P. M. Fine pleasant breezes from S. W.
all sail set following sea

8 h. Wind inclining more westerly

Midnight hauling to N. W.

AM. Breeze increasing handed S. Sails

8 h. A. M. fresh and sharp squalls
 Noon top gall sails stowed & Main Sail
 fresh gale sea making
 Shifted the fresh water all in one tank
 Now 6 ft. remains
 People various jobs clearing up etc
 Foster still sick
 Following lookout
 Bar. 30.10

Nov. 19

P. M. Strong gale with hard squalls ship
 under top sails
 3 h. Sea increasing from N. W. put ship
 under close reefs
 8 h. Shipping heavy water all over
 Stowed fore sail hard gale
 9 h. Gale continues with increased force
 raising a tremendous sea; ship laboring &
 straining
 Decks constantly full of water
 Midnight do. do. no abatement
 AM. The same Bar. 29.40 falling
 Find the gear at main mast & rigging all
 washed down from pins and towing at scup-
 pers & ports. Damage to pots, etc in galley.
 Noon less wind but sea still running high.
 Bar. 29.40 29.10 at noon. Running look-
 out.

Nov. 20

P. M. High gale with tremendous sea run-

ning; ship under close reefed top sails—F.
T. S. & Miz. do.

keeping by the wind to save heavy water
coming on board.

6 h. Blowing with hurricane force

Ship laboring & straining to keep free from
heavy seas breaking at times fore and aft,
flooding every part

Midnight Bar. rising weather still very bad.

4 AM. Shipped sea over lee quarter knock-
ing door in cabin chart house open, flood-
ing the cabin & chart room, finding its way
to storeroom and damaging a quantity of
stores 500 lbs. flour, Sugar, $\frac{1}{2}$ cw. Tea 5
chs. Bread—Cabin other day stores.

The grating was washed overboard.

Top sails and top gall halliards again badly
chafed through the constant working of the
masts

The fore top gall yard nearly out of slings
Mast badly chafed.

Cook badly off for pots;

10 h. AM. Moderating a little squared
away, sea still running high, but not such
force

Set fore sail; again short of f. water.

Foster still sick.

Bar. 29.80 Noon

Running lookout.

Nov. 21

P. M. Ship running with fine fresh breezes from Westd.

rolling heavy.

3 h Set reefed main top sail

10 h. Set full fore U. S. Sail

Midnight fine brisk breezes

AM. Sea rolling up from S. W. causing ship to roll badly, straining aloft; find the bands on U. M. S. gall yard in slings yard all adrift

Carpenter busy fixing the same with two of the hands

Decided calling at an Australian port possibly Sydney, N. S. W.

Noon fine steady breezes

Foster still sick

Bar. 29.50

Following lookout ,

Nov. 22

P. M. Ship running with whole top sails cross sea from S W causing the ship to roll heavily, shipping large quantities of water at short intervals, straining aloft badly.

Cook reports his last saucepan broken

Midnight dull with mizzling rain

4 h. AM. Clearing up to W. S. W.

Daylight set main top gall sail

People variously employed refitting chafed gear etc

The Capt reports Parks Chro. stopped 4 hrs. after winding up.

Fore hatch off today

Clearing out paint drums for cooking

Foster still on sick list

Following lookout

Bar. 30.20

Nov. 23

P. M. Moderate breezes from Westd.

4 h Wind hauling—set F. Top gall sail, etc.

8 h Set jib and main sail

Sea rolling up from S W

Midnight do. do.

AM All sail set

Set up fore top mast and top gall back stays both sides

People at various jobs at gear aloft everything badly chafed

Carpenter making wedges for top gall yards

Foster still sick

Following lookout

Nov. 24

P. M. Fine moderate breezes all sail set to best advantage

Sea rolling up from S W

Midnight fresh, dull showers, stowd. main sail & U. T. Gall sails, jib, etc

AM Continues thick & Hazy—hand on lookout continually

8 h AM Set full main sail

Carpenter still at top gall. yards
 People at various jobs aloft
 Foster still sick
 No observations this day too thick fog
 Continuous lookout

Nov. 25

P. M. Fine steady breezes ship rolling a
 good deal & shipping water
 Midnight dull & hazy
 AM. Fine bright breezes
 All possible sail set
 Saturday—general clearing up
 Foster still sick
 Following lookout

Nov. 26

PM. All sails set to moderate West.
 breezes.
 8 h. do. do.
 Midnight—dull with mizzling showers
 4 h do. do.
 8 h Thick fog
 Noon fog clears off
 Foster still sick
 Following lookout

Nov. 27

P. M. Light breezes from S W with fog
 at times fine smooth sea
 8 h do. do.
 10 h. Wind hauling to N W light airs
 AM. do. with dense fog

Main sail hauled up. S. S. all down calms
Set M. Sail N. W. to W. N. W.

People securing cargo in fore hold and general clearing up

Carpenter repairing F. water pump

Foster still sick

Foll. lookout

Nov. 28

P. M. Light breezes fog continues lookout kept all time all sails set

Midnight dense fog almost like rain

AM. do. do.

People still employed securing cargo at after hatch

Carpenter repair cabin funnel

Noon a little more clear at times

Foster still sick

Continuous lookout

Nov. 29

P. M. Light to fair breezes all sail set with occasional fog banks

8 h do. do.

Midnight do. do.

AM. Same throughout

People employed at rigging, etc, repairs aloft

Tradesmen at their trades

Foster still sick

Following Lookout

Nov. 30

P. M. Wind falling light dull and overcast fog banks.

8 h. fog continues.

Midnight inclining to S. W. with slight drizzle

4 h A. M. Sharp up to South wind

People variously employed

Tradesmen at their trades

Foster still sick

Following lookout.

Dec. 1

P. M. Ship sharp on starboard tack.

Noon hauled stay sails

5 h hauled main sail

6 h tacked ship

7 h Starboard main sail

8 h light breezes dull mizzling mists

Midnight do. do.

A. M. continues

5 h clearing up. Making sail

8 h A. M. Set main sail, all sail

Tradesman at trades

Foster still sick

Following lookout.

Bar. 30.00

Dec. 2

P. M. Fine brisk breezes from westward all sail set

8 h Squared in and stowed main sail to

fine fresh breezes

10 h stowed fore top gall sail

Midnight fine fresh breezes

A. M. do. do.

People at various jobs. New teather on F.
S. gall yd. parrell.

Foster still stick.

Following lookout.

Dec. 3

P. M. Fine bright breezes. Ship under top
gall sail, wind dead aft.

8 h do. do.

Midnight do. do.

A. M. Showery stowed fore top gall sail

Foster still sick bad ear.

Following lookout.

Dec. 4

P. M. Fine fresh breezes. Ship running
with main top gall sail

Midnight fresh squalls with slight showers

A. M. do. do.

Making sail

Noon all square sail set

Fitting port L. F. Top sail clew line new
old carried away

Foster and Lewis on sick list.

Following lookout.

Dec. 5

P. M. Fine fresh breezes all square sail set
westerly sea following

6 h Sharp breezes with squalls
 8 h stowed mainsail
 10 h 30 U. M. T. Gall sheet broke at chain.
 Made fast both U. top gall sails jib and M.
 T. S. sail
 Midnight fresh gale squally
 A. M. do. do. Shipping quantities of
 water most amidships
 Repair top gall sheet sundry fitting gear,
 etc.
 Foster sick Lewis on duty
 Following lookout.

Dec. 6

P. M. Fine favorable moderate breezes
 1 h set main sail and M. T. Gall sail
 4 h Falling light, making sail
 8 h All square sail set
 Midnight heavy rolling light breezes
 A. M. do. do.
 5 h Wind right aft mainsail hauled up
 A. M. Fine bright weather
 People fitting fish pendant new
 Tradesman at trades
 Foster still sick.

Dec. 7

P. M. Light breezes and dull appearance
 8 h. Slight showers overcast
 Midnight do do
 A. M. Clearing up light breezes.

Noon. Fine bright weather F. & A. hatches off

People various, securing outriggers, etc.

Tradesmen at trades.

Foster still sick

Dec. 8

P. M. Pleasant breezes all sail set

8 h. Fresh and overcast

9 h. Light S. Sails, Jib and gaff T. sail

Midnight strong breezes lightening to Westward

Stowed main sail

2 h hard squalls with rain stowed top gall sail

3 h Wind freeing more westerly cross sea

Shipping quantities of water

5 A. M. More mod. making sail

Noon all square sail set

People fitting fish pendant

Tradesmen at trades

Foster and Husker sick

Following lookout

Bar. 29.70

Dec. 9.

P. M. Fine fresh breezes all square sail set, less M sails

5 P. M. Wind aft freshing stowed F. T. G. Sail

9 h. Strong squalls stowed M. T. G. sails

Midnight ship running with whole top sail
 Cross sea shipping quantities of water
 5 A. M. do. do.
 8 h. Moderating making sail
 Noon all at main set
 Saturday general cleaning up
 Foster still sick
 Following lookout
 Bar. 29.80

Dec. 10.

P. M. Fine fresh breezes all square sail set
 less M. sail
 5 - dull overcast to N. W. threatening
 stowed fore top gall sail
 8 h increasing breezes, stowed M. T. G.
 sail
 Wind back to west
 Midnight, do. do. miserably cold sleet
 2 A. M. Shift to S. W. fresh
 N. W. Sea still running shipping bodies
 of water
 A. M. Set M. T. Gall sail (tore)
 No work being Sunday
 Foster still sick
 Following lookout

Dec. 11.

P. M. Fresh breezes with heavy sea from
 S. W. shipping considerable quantities of
 water—lower M. T. Gall sail set
 7 h Starboard W. F. T. sail sheet carried

away the clew of same knocking hole in
lower F. top gall sail,

Stowed top gall sail

Repaired top sail and set again (chain
broken) at nip of yard sheave

Midnight do. do.

A. M. falling light making sail

Unbent W. F. T. G. sail for repairs set up
again and bent same

People employed at sails shifting and re-
pair

Foster still sick

Following lookout.

Dec. 12.

P. M. Commences with light westerly
breezes; shifted new fore top sail old sail
badly chafed

Still rolling heavy

Midnight fine weather

A. M. do. do.

3 h inclining to N. W.

Set lower stay sails

Noon dull overcast—sea smooth

People fitting various jobs

Tradesmen at trades

All square sail set less main sail

Foster still sick. Lewis A. B. do.

Following lookout.

Dec. 13.

P. M. Fine stead breezes all sail set less
main sail
8 h increasing breezes
10 h stowed fore top gall sail jib and U.
main to strong breezes
Midnight strong breezes shipping large
quantities of water
2 A. M. Stowed L. M. T. G. sail, jib and
M. T. M. S. S.
8 h gale still blowing hard
Noon breaking up to westward heavy sea
Foster sick Lewis A. B. do
Bar. 29.60

Dec. 14.

P. M. Fresh gale from S. W. Ship under
full top sails heavy sea running, shipping
large bodies of water
3 h set lower top gall sail
8 h Set all square sail less main sail
Sea going down
Midnight fine breezes bright weather
A. M. do. do.
People shifting U. T. Sheets end for end,
fore and main
Fore hatch off all day
Tradesmen at trades
Foster still sick and Lewis A. B. s

Dec. 15.

P. M. Very light breezes all sail set

6 h inclining to N. W.
 10 h fresh breezes in light S. sail
 Midnight fresh stowed main sail
 A. M. increasing stowed top gall sail
 4 h hard squalls
 8 h dull mist overcast
 Noon making sail
 Foster still sick Lewis A. B.

Dec. 16.

P. M. Fresh breezes ship rolling heavy
 under lower top gall sail, M. sail fast
 4 h Set M. U. T. Gall sail
 6 h Showery—heavy water on deck
 Midnight sea going down
 3 set all square sail less M. sail
 Fine brisk breezes
 People general cleaning etc.
 Foster still sick and Lewis Neuralgia
 Bar 29.80

Dec. 17.

P. M. Moderate breezes
 do. do.
 Midnight do. do.
 A. M. Freshing do. do.
 Foster sick and Lewis A. B.
 Following Lookout.

Dec. 18.

P. M. Fine moderate breezes all square
 sail set
 8 h stowed top gall sails

Fresh gale high sea shipping water

Midnight do. do.

A. M. do. do.

5 h Making sail M. T. Gall sail

Noon fresh gale increasing

Various job

Lewis and Foster sick

Bar. 29.60

Dec. 19.

P. M. Fresh gale high sea handed top gall sails

4 h high gale shipping water

10 h moderating

Midnight set L. M. T. Gall sail

Sea going down

A. M. do.

Daylight set all square canvas

Various jobs

Tradesmen at trades

Lewis and Foster sick

Dec. 20.

Fine moderate breezes all sail set

4 h hauling to N. W. stowed main sail

6 h Upper top gall sails

Midnight fine strong breezes squally

A. M. do. do.

5 h Set main T. G. sail fresh breezes

Noon fresh squally

Various jobs

Tradesmen at trades
 Foster and Lewis A. B.s sick

Dec. 21.

P. M. Fresh breezes and squally stowed
 fore top gall sails high sea running ship-
 ping quantities of water
 6 h do. do.
 Midnight clearing a little
 A. M. do. do.
 7 h Hauling to S. W. showery
 10 h set fore top gall sail
 Noon fine bright breezes
 Various jobs, splicing M. braces and fore
 top gall halliards
 Tradesmen at trades
 Lewis and Foster sick A. B.

Dec. 22.

Fine moderate breeze all square sail set less
 main sail, showery
 6 h do. do.
 8 h. do. do. fine settled
 Midnight do. do.
 am. — —
 8 h Set all sail
 Ship rolling heavily
 Various jobs
 Tradesmen do. do.
 Lewis and Foster sick A. B.s

Dec. 23.

P. M. Light breezes all sail set

8 h Breezes freshening
 Midnight stowed main sail jib
 Upper top gall sails
 2 h stowed lower do. do.
 I. Jib M. T. stay sail
 Shipping quantities of water
 A. M. do. do.
 Various jobs clearing up
 Lewis and Foster sick
 Bar. 29.60

Dec. 24.

P. M. Ship running with lower M. T. G. sail
 Fresh breezes
 3 h set fore do.
 Dull overcast sky, N. W. sea running shipping quantities of water
 8 h clearing to S. W.
 Midnight Set U. M. T. G. sail to favorable breezes
 A. M. All square sail set
 7 h Shift to S. W. increasing gale took in top gall sail etc.
 8 h height of gale
 Noon keeping ship off to save shipping heavy water
 Lewis and Foster sick
 Bar. 29.70

Dec. 25.

P. M. High gale from S. W. heavy sea

running shipping large bodies of water
decks full at times

Keeping ship off

8 h still continues

Midnight sea running more true

Steering better less water on deck

A. M. Set lower stay sail jib and etc.

Hauling to as prudent

10 h set main top gall sail, and lower fore

Noon still heavy swell ship rolling

Gunwales under both sides

Lewis and Foster sick.

Bar. 29.80

Dec. 26.

P. M. Weather moderating sea going down
still heavy swell from S. W. set all sail
ship rolling and tumbling about decks full
of water at intervals

8 h wind hauling more westerly
stowed main sail

Midnight nice steady breezes

4 h fresh wind aft stowed U. T. T. G. sail

Noon all sail set fine bright weather quite
warm

Scrubbing, etc., going on various jobs

Tradesmen at trades

Lewis and Foster returned to duty

Dec. 27.

P. M. Fine brisk breezes all sail set

8 h Hauling more southerly

Midnight fine breezes

A. M. do. do.

Hands scrubbing rust from bulwarks

Tradesmen at trades

Find cask of K. oil leaked out 2 hoops off
cask

Dec. 28.

Fine moderate breezes all sail set

Midnight dull mizzling haze damp

A. M. do. do.

People scrubbing bright work poop

Tradesmen at jobs

Noon poor obs.

Dec. 29.

P. M. Fine moderate breezes with dull
leaden sky damp atmosphere.

Ship rolling considerably.

9 set jib and M. T. S. Sail

Midnight do. do.

A. M. Fine bright weather all possible sail
set

Hands scrubbing bulwarks etc.

Tradesmen at trades

F. W. tank 15 in.

Dec. 30.

P. M. Fine moderate breezes all sail set
clear bright weather

Midnight fog banks at intervals

A. M. Wind falling light

General cleaning and overhauling
Tradesmen at trades.

Dec. 31.

P. M. Light breezes dull overcast
All possible sail set
Midnight falling light heavy dew
A. M. do. do.
Wind hauling more to northward

Jan. 1, 1900.

P. M. Light breezes airs and calms
dull at times fog
8 h Shift round to S. W.
Midnight more southerly—close hauled
A. M. clearing up fine bright breezes

Jan. 2.

P. M. Light breezes dull overcast
4 h tacked ship to eastward set all sail
8 h Fine pleasant breezes
Midnight do. do.
A. M. Same throughout, bent cables, put
anchor on rest ready
Tradesmen at trades.
Rove off new main starboard brace, old
brace much chaffed and spliced
Fine bright pleasant breezes
Bar. 29.80

Jan. 3.

P. M. Light breezes close and sultry
8 h wind flighty to northward with hot
puffs

stowed upper S. S. sails

Midnight light breezes lightening to northward

2 A. M. Heavy flashes increasing breezes

Stowed O. J. fore top gall sail main sail and U. M. T. G. sail

8 h Wind hangs to northward fresh at times rove off fish fall 65 fms. fore top sail halliards and rove off main brace from 3 in. 47 fms.

Noon dull glare

People various jobs scrubbing etc.

Bar. 29.70

Jan. 4.

P. M. Fresh breezes from N. E.

4 h. Strong breezes from Westward

8 h Moderating

Midnight fine bright breezes

3 A. M. sighted Otway light E. by N.

7 A. M. abreast of signal station and L. house

reported to signal station

Cape Otway

People oiling bright work both anchors over the bow ready

Dist. on patent log 135 miles, Chro. nearly correct

Noon fine bright weather, brisk breezes

Land in sight to northward shank

Jan. 5.

P. M. Fine bright breezes from S. W.
 All sail set
 Midnight close hauled on starboard tack
 Land of Wilsons Promontory in sight
 2 A. M. opened the light at E. N. E. 8
 miles dist.
 4 h passed thro. between Rodondo south-
 ward and Wilsons Promontory
 8 h abreast of Hogan Island
 Shaped course for Cape Howe
 Noon fine pleasant weather
 Took new coir 6 in. on deck and took turns
 out.
 Tradesmen at trades
 Lookout day and night

Jan. 6.

P. M. Light breezes from N. N. E.
 Hogan Island bore S. W. $\frac{3}{4}$ S. at 2 P. M.
 dist. 15 miles.
 8 h tacked ship to southward
 Midnight easterly appearance
 7 Stowed main sail for working ship
 O. jib and stay sails
 8 A. M. Tacked ship Flinders Island S.
 S. E. dist. about 10 miles
 Hands cleaning up etc.
 Lookout day and night

Jan. 7.

P. M. fresh breezes from eastward

3 h took in top gall sail jib and M. T. M.
SS. fresh gale

7.30 Stowed U. F. top sail

8 h wore ship to south east

Midnight more moderate

A. M. do. do.

7.30 Set U. F. top sail

Noon lower top gallant sail set

Ship now steering form Sidney N. S. W.
to refit

Lookout day and night

Jan. 8.

P. M. Breezes tacking off from eastward

3 h P. M. ship to S. W. fresh with sharp
shower which continues till six

8 h fine steady breeze set U. M. T. G. sail

Head sea going down

Midnight fresh breezes

AM. do. do.

Took in U. M. T. G. sail to haul in on land

Land in sight at back of C. Howe

Lookout day and night

Jan. 9.

P. M. Fine moderate breezes set M. T. G.
sail sea going down fast

7.30 Montigue Island Lt. bore W. $\frac{3}{4}$ S.
dist. 14 miles

Wind light from Eastward

Midnight light dipping at W. S. W.

Light baffling airs and calms

4 h wore ship to N. E.
 8 h A. M. tacked to Westward
 Noon land about 8 h miles dist, 21 miles
 north of Montigue Is
 People at various jobs
 Carpenter repair hen coop
 Sails at top gall sail
 Day and night lookout.

Jan. 10.

P. M. Standing in shore starboard tack—
 under top sails and top gall sails
 8 h top gall sails stowed wore ship lightening
 vivid to westward
 In wearing ship heard something go bang
 at steering gear
 8 h 30 another clang, took off steering
 cover and found the pin on port side of
 tiller rudder head broken in two, and the
 arm hanging down, put on relieving tackles
 at once, with rudder huffs down
 Stowed U. top sails, ship laying to, took
 up accom. ladder davit, cut a piece from
 the small end. Carpenter to work
 8 A. M. put in the new pin pro tem—keep-
 ing the tackles fast
 Ship about the same position as yesterday,
 seven miles further south.

Jan. 11.

P. M. Weather unsettled with dense clouds
 coming over from S. W. lightning etc.

2 P. M. Hauled fore sail in gear
 4 h wore ship to eastward land dist. 8
 miles
 8 h fresh gale from nothward fore sail set
 and M. T. most
 S. S. light Montigue Islands bore W. S. W.
 dist. 15 miles
 10 h Shift to S. W. and S. fresh
 Midnight clearing set fore sail
 A. M. Making sail
 4 h. M. T. G. sail
 8 h 30 reported signal station Servis Bay.
 Pt. Perpendicular
 11 h C. Beecroft abeam, dist: off shore 8
 miles
 Dist. from Sydney heads about 60 miles
 Lookout day and night

Jan. 12.

P. M. All possible sail set to light S. E.
 breezes
 4 h singled anchor lashings
 4.30 S. tug "Storm Cock" engaged gave
 ship tug's hawser and proceeded in tow
 11 h fine bright weather picked up Sid-
 ney light
 2 A. M. passed through the Heads
 2.30 brought up in Watson Bay
 45 fms on Port Anchor, set anchor watch
 5h 30 health officer boarded and passed
 ship

Hove up anchor and proceeded to anchorage abreast 7 Pinch Gut in 7 fms. 30 fms.

Cable out

Punt over side scrubbing etc.

Also setting up head stays



No. 1167

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

C. W. CORSAR et al., owners of the ship
"Musselcrag",

Appellants,

vs.

J. D. SPRECKELS & BROS. CO.,

Appellees.

FILED
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APPELLEES' POINTS AND AUTHORITIES.

NATHAN H. FRANK,

Proctor for Appellees.

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APPELLEES' POINTS AND AUTHORITIES.

This case presents two questions for determination:

1. Was the opening of the decks of the vessel, and the consequent damage to the cargo, the result *either in whole or in part*, of her improper lading?

2. If the damage suffered off Cape Horn was *not* the result, either in whole or in part, of her improper lading, still the vessel could have been repaired at the Falkland Islands, 360 miles distant, and thus prevented the additional

damage which resulted to the cargo in her passage from Cape Horn to Australia.

Is the failure of the master to so repair his vessel an act for which the ship is liable?

And, as auxiliary to this last question,—If the ship be liable for this act of the master, what is the measure of damage?

I.

WAS THE OPENING UP OF THE DECKS OF THE VESSEL, AND THE CONSEQUENT DAMAGE TO THE CARGO, THE RESULT, EITHER IN WHOLE OR IN PART, OF HER IMPROPER LADING?

This is a question of fact. In his opening, counsel calls attention to the severe damage suffered by the vessel off the Horn as evidence that she had met with unusual weather, and he concludes that the damage was the *result* of the bad weather. We, on the other hand, contend that the weather was not unusual weather for Cape Horn, and that, *even though it were admitted to have been unusual, the improper lading of the vessel made her unseaworthy*, and but for such unseaworthiness the damage would not have occurred, notwithstanding the weather.

The difference in our positions regarding this matter is well illustrated by what the Supreme Court says in the case of

The Portsmouth, 9 Wall. 682,

respecting ^{excepted} ~~expected~~ perils and the proximate cause of the loss:

“A loss by a jettison occasioned by a peril of the sea is, in ordinary cases, a loss by perils of the sea. But it is well settled that, if a jettison of a cargo, or a part of it, is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison *must be attributed to that fault or breach of contract, rather than to the sea peril, though that may also be present and enter into the case.* * * * This is a principle alike applicable to exceptions in bills of lading and in policies of insurance. * * * Though the peril of the sea may be nearer in time to the disaster, the efficient cause, without which the peril would not have been incurred, is regarded as the proximate cause of the loss.”

See also

The Whitlieburn, 89 Fed. 526,

where this principle is applied to a case of jettison made necessary by *improper stowage*.

In applying this principle to the case at bar, the first question to be determined is as to her lading, and in that connection preliminary to considering the facts, what is the legal duty of the shipowner respecting the lading.

Improper Lading Resulting in Unseaworthiness is Breach of Warranty.—In passing upon this question of legal duty, the District Court has fallen into a palpable error. The decision is based upon a mistaken principle of law, or, perhaps more ac-

curately stated, a mistaken application of a legal principle. In coming to the conclusion that the evidence is not sufficient to establish the fact of improper stowage, the Court says:

“Stowage, with a view to the proper trim of the vessel and the ease with which it will be able to carry its cargo when at sea, is a matter ~~which~~ which calls for the *judgment* of those under whose supervision it is done. *The carrier is only required to exercise reasonable care and skill in stowing cargo*, and the mere fact that if it had been differently distributed the ship would have been more easy, *does not necessarily show* that the cargo was *negligently stowed*; that is, stowed in such a manner as would not have been approved at the time by a stevedore or master of *ordinary skill and judgment*, knowing the voyage on which the vessel was about to sail, and the weather and sea conditions which she might reasonably be expected to encounter. *In order to establish such negligence* as is claimed here, the *disproportion* between the amount stowed in the lower hold and that placed between decks, *must be so great* as to warrant the conclusion that *reasonable judgment* was not used in loading the vessel, and I am not satisfied from the evidence that such great disproportion existed in this case.”

From the foregoing, it will at once be seen that the mind of the Court was not directed to the effect of the low stowage in weight of cargo on the seaworthiness of the ship, but, basing his decision upon the idea that the question before him was one of “negligence” or “reasonable judgment” he concludes that *the dif-*

ference between 150 tons more or less in the lower hold rather than in the between decks was not in itself such a difference in number of tons compared with the whole cargo, as "to warrant the conclusion that *reasonable judgment* was not used". In this conclusion two important elements in arriving at a proper result have been overlooked, (1) The difference of 150 tons in the lower hold rather than in the between decks, though not large in amount of tonnage, may be very large in its effect on the ship's meta center. And that such was the fact here we expect presently to show from the record. In this connection it will be noticed that in the case of *The Colima*, hereinafter cited, the stowage on deck of only 47 tons out of a total of over 2181 tons cargo, ballast and stores, capsized the ship. 82 Fed. 665. (2) The legal duty devolving on the ship-owner was not the exercise of "reasonable judgment", nor, "to exercise reasonable care and skill in stowing cargo", but it was the absolute duty to so stow it that the vessel should be seaworthy—it was a warranty.

The Warranty.—That an implied warranty of seaworthiness, absolute in its nature, accompanies the contract of affreightment, must be admitted; and it must further be admitted that such warranty does not depend upon the judgment, skill, care, or negligence of the shipper.

In the language of the Supreme Court, *The Caledonia*, 157 U. S. 130 and 131:

“In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact, seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence. * * *

“In our opinion the shipowner’s undertaking is not merely that he will do, and has done, his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage.”

The Unseaworthiness.—That a vessel improperly laden *is unseaworthy* within the meaning of such warranty, must also be admitted.

The Whittlieburn, 89 Fed. 526;

The Colima, 82 Fed. 665;

The G. B. Boren, 132 Fed. 887;

The Oneida, 108 Fed. 886;

The Oneida, C. C. A., 128 Fed. 687;

Sumner v. Caswell, 20 Fed. 249;

The William Power, 131 Fed. 136.

In *Sumner v. Caswell*, above cited, the issue is stated by the Court in the following language:

“On the ground that they *used all such care and diligence as could reasonably have been expected in the stowage and ballasting of the ship*, the owners insist that no liability attaches to them; contending that, under a charter of the character described, they are not re-

sponsible as common carriers, but only *for reasonable diligence* as bailees for hire.”

The Court held the ship liable because

“Through her mode of lading, in connection with the want of sufficient ballast to prevent her being dangerously top heavy”, she was unseaworthy (p. 252), and

“By the nature of the contract, they impliedly and necessarily warrant that the ship is good, and in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy; that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must, of necessity, be exposed in the course of the voyage, and this implied warranty attaches and has reference to all the conditions of the ship at the time she enters upon her voyage” (p. 253).

In *The Whittieburn* the vessel was “in herself” “in all respects seaworthy”, but, “*as loaded* was tender”. The Court held that the warranty “speaks from the time the ship sails and makes the owners responsible for her seaworthy condition, not as regards her hull and equipment alone, but also as respects ballasting and loading and stowage of cargo”. It was further held that the *risk of any uncertainty* with respect to the loading should fall on the shipowner.

In passing it might also be noticed that the vessel experienced “a gale” in which “she lay well over and took large quantities of seawater on board”; that at other times “she ran before the

wind with much water aboard and burying herself"; that "the crew took to the rigging; three were washed overboard, of whom one was drowned"; that after consultation "the upper cases in the between decks were thrown overboard, after which the ship pursued her course without special difficulty", thus, in many respects paralleling the circumstances set up as "perils of the sea" in the case at bar.

In *The Colima*, the petitioners were held liable because "she was lacking in *seaworthy stability* through her tender model, and *the mode of loading* combined" (p. 670).

In *The Oneida*, the vessel was found unseaworthy "in the stowage and distribution of cargo weights", "through instability and top-heaviness" (p. 887).

If, then, improper lading tends to render the vessel unseaworthy, the rule upon which the judgment of the District Court was based, was erroneous, viz: "stowage with a view to the proper trim of the vessel and the ease with which it will be able to carry its cargo when at sea is a matter which calls for the judgment of those under whose supervision it is done. The carrier is only required to exercise reasonable care and skill in stowage of cargo", etc. On the contrary, in the language, of the Supreme Court above quoted, the shipowner's liability "does not depend on his knowledge or ignorance, his care or negligence". The warranty is absolute that the ship is in fact so

stowed as to render her really fit with said cargo "to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage".

Must be Seaworthy for Cape Horn Weather.—In this connection we desire to call attention to the attempt made by the shipowner, to avoid the effect of the showing respecting the ship's lading, by referring to the damage the vessel suffered off the Horn, and to the violence of the storms she met. It must, however, be borne in mind that the Horn is proverbial for violent storms. "The Horn is a place that we have to provide against for extreme weather" (Quale, p. 106). Storms are the most usual and therefore the expected condition, while the damage sustained is, as the testimony discloses, directly referable to the stiffness of the ship, which rendered her unable properly to ride those storms. Being bound on *such* a voyage, she should be more carefully laden than for one where storms are less expected. That is what was meant by the Supreme Court when it said the ship must be "really fit to undergo *the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage*". Accordingly that Court in the case of *The Edwin I. Morrison*, 153 U. S. 211, referring to a finding of the lower Court of weather conditions quite as bad as in the case at bar (See Appendix I post), said:

“We do not understand from the findings that the severity of the weather encountered by the Morrison was anything *more than was to be expected upon a voyage such as this*, down that coast and in the winter season, *or that she was subjected to any greater danger than a vessel so heavily loaded, and with a hard cargo, might have anticipated under the circumstances.*”

The parallel in conditions with the case at bar cannot escape notice.

In the same connection (the above quotation being interpolated at the point now indicated by asterisks) that Court said:

“Perils of the sea were excepted from the charter party, *but the burden of proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence or one of their servants contributed (citing cases). It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies not reasonably to have been anticipated.* * * *

“The especial peril which seemed at one time to have threatened her safety was directly attributable to the water taken aboard through the uncovered bilge pump hole, which rose from eighteen inches about 5 A. M. to seven feet at 9 A. M., so that she was necessarily sinking deeper and deeper, while the absorption of the guano added to the dead weight, and increased the danger of her going down.”

The cap and plate above referred to, which was washed away in the storm, corresponds to the opening of our seams through the straining of the ship. The ship was held liable, and the decision is a striking illustration of the principle laid down in *The Portsmouth* already cited. See also *The Aggi*, 93 Fed. 484, Syllabus 3.

Hence, we say, if the "Musselerag" was not properly laden with reference to storms off the Horn, then, *notwithstanding the stormy weather*, in the language of *The Portsmouth*, 9 Wall. 682,

"the jettison must be attributed to that fault or breach of contract, *rather than to the sea peril, though that may also be present and enter into the case.*"

The Burden of Proof.—One word more, with respect to the argument of appellant (brief, pp. 20, et seq.) concerning the burden of proof. Though we do not think, under the facts in the case at bar, the question is of much importance, we do not desire to forego any advantage properly belonging to us under the principle. We shall presently see that this vessel showed her weakness not, as in the case relied on by appellant, after "for a considerable time, she had encountered such perils and shown herself staunch and strong", but on the contrary, before she had ever reached the Horn, and again in the very first breeze they had off the Horn, thus creating a legal presumption, of unseaworthiness.

In addition to this presumption, the testimony of her unseaworthiness is direct and affirmative.

Nevertheless, we contend it is error to say that the burden of proof is on appellee. In the above quotation from *The Edwin I. Morrison* the statement, without reservation, will be noticed, that the burden of proof is on the ship, and, in the subsequent case of *Martin v. Southwark*, 191 U. S. 1, 15, 16, the rule is, under the authority of the above case, expressly reaffirmed, notwithstanding the provisions of the Harter Act, it being said:

“But whether fault can be affirmatively established in this respect, it is not necessary to determine. The burden was upon the owner to show, by making proper and reasonable tests, that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried; and if by the failure to adopt such tests and to furnish such proofs, the question of the ship’s efficiency is left in doubt, that doubt must be resolved against the shipowner and in favor of the shipper.”

In view of this language, we scarcely feel that the remarks of Justice Gray in *The Wildcroft*, 130 Fed. 528, based upon a parenthetical phrase in *The Chattahoochee*, ^{are} ~~is~~ justified. Furthermore, they were obiter, for the facts of the case did not call for any application of the rule, because there the claimant *did* produce both “direct and circumstantial evidence” of seaworthiness “and there was no controverting testimony produced by the libellant” (p. 528).

With these preliminary considerations, we come to the question:

Was the Musselcrag in Fact Really fit to Undergo the Perils of the Sea, and other Incidental Risks to Which She Must be Exposed in the Course of the Voyage?

We begin with the admitted fact that the vessel was “naturally a very stiff ship”; (Johnson, Master, p. 54).

We have also admitted ^{the} ~~the~~ fact that cement is a heavy, compact cargo, and unless properly distributed, will in itself make the vessel too stiff for safe navigation. As said by Milne,—“Cement is a very bad cargo for a vessel to roll with” (Milne, p 29).

Action of Ship Before Reaching the Horn.—Before the vessel struck the Horn, she showed, in the manner of her straining, indications of bad stowage. With very ordinary weather she is found to be rolling heavily and straining sufficiently to cause her seams to start. This opening of the seams before reaching the Horn is attempted to be explained by the suggestion that it is the result of contraction due to the heat in the tropics, but the position of the vessel at the time, as well as her conduct, evidenced by the log, indicates that this is not the case (Record p. 110). For instance, on August 2nd, before she reached the tropics, her putty broke out on the poop (p. 33). This could only be due to the working of

the ship. Then on September 17th, we find the ship rolling violently, and the next day we find the carpenter caulking the main decks, and the hands below securing cargo loose fore and between-decks. (See Log attached.) Up to this time Milne testifies that they had "experienced no bad weather, but that the ship rolled pretty heavily", adding in explanation, "but nothing particular *with the cargo she had in*" (Milne, pp. 28-29), thus recognizing that her heavy rolling was due to the cargo. And Lawson says she had "fine weather all the time" (pp. 34-35),

While Milne maintains that the cement was high enough in the ship, he is still unable to say why the cement caused her to roll so heavily (Milne, p. 29). That discrepancy is, however, explained by the fact that while he would observe the action of rolling, being a carpenter, he knows nothing of loading a ship or her navigation, and so admits (pp. 32-33).

The master admits that the *weight* of the cargo has nothing to do with her stiffness. *That* depends upon the nature of the cargo, *and the manner in which she is stowed* (Johnston, p. 69).

On September 29th we find an entry in the log that the seams in the fore deck were leaking *through straining*, and Farraday, the second mate, is compelled to admit that she rolled and strained several times, "but not very bad *like off the Horn*".

Q. SHE ROLLED AND STRAINED SUFFICIENT TO OPEN HER SEAMS BEFORE SHE GOT AROUND THE HORN?

A. YES SIR, BEFORE SHE GOT DOWN THERE. THERE WAS OIL AND SOMETHING ELSE PUT ON THE SEAMS.

Q. THAT CAME FROM HER STRAINING AND ROLLING?

A. YES SIR.

(Farraday, p. 44.)

This action of the ship is thus a silent witness of her improper lading, sufficient without the direct testimony of Captain Quayle, who is asked:

Q. Is there anything in the log-book that would indicate to your mind that the vessel was unusually stiff from the actions of the vessel as described in the log-book?

A. Yes, by entries in this log-book, even before she gets to the Horn, in what we call moderate latitudes, she is described as laborsome and rolling heavy under normal conditions.

Q. And what would that indicate to your mind as an experienced mariner, regarding her lading?

A. The ship was too stiffly laden. By the entries in the log-book the master himself most likely thought so, as he was lifting some cargo out of the lower hold into between-decks, and trying to rectify some of its laborsomeness. (Record pp. 107-108.)

The First Breeze off the Horn.—*The next day after the first breeze they had off the Horn, the carpenter went down and found the decks weeping (Milne, p. 30). Then for about a week he could not go down, and when he did go again, they were worse (Milne, p. 30).*

Whatever may be said about bad weather experienced around the Horn, this starting of the decks in the *very first breeze* she struck, indicates that she was in no condition to meet the weather *ordinarily to be expected off the Horn*. One might attribute the damaged condition of the vessel to a peril of the sea, if she *began to give away after long and continued stress of weather*, but when we find her seams opening in good weather, before she reaches the Horn, and weeping after the very first breeze she strikes off the Horn, we are convinced that she is not seaworthy. These conditions, without further comment, are a complete answer to appellant's argument on pp. 21-22 of his brief, and prove his authorities not only inapplicable, but create a presumption of unseaworthiness under the rule applicable to vessels that leak without sufficient cause.

After her experience on her way to the Horn, we are not surprised at her unusual behavior at the Horn in laboring about very heavily.

Q. Did she roll very heavily?

A. Yes sir, she rolled something very bad.

Q. And strained very hard?

A. Yes sir.

Q. She rolled and strained before you got down to Cape Horn?

A. No sir, she was all right until we got down there.

Q. Did she not roll and strain any before you got to Cape Horn?

A. Not a great lot, no sir; she was all right, like any ordinary ship.

Q. I find an entry in the Log on September 29th: "Find seams in fore deck leaking, put on tar and oil on seams through straining." Do you remember anything about that?

A. We had several gales, not very hard. Of course she rolled and strained several times but not very bad, like off the Horn.

Q. SHE ROLLED AND STRAINED SUFFICIENT TO OPEN HER SEAMS BEFORE SHE GOT AROUND THE HORN?

A. YES SIR, BEFORE SHE GOT DOWN THERE THERE WAS OIL AND SOMETHING ELSE PUT ON THE SEAMS.

Q. THAT CAME FROM HER STRAINING AND ROLLING?

A. YES SIR.

(pp. 43-44.)

Shifted Cargo.—An Admission of Improper Stowage.—

The master, also, must have recognized that his ship was not perfectly laden, because before he got to the Horn he shifted the cargo, and though it is contended that this was confined to some cases of bottles, Farraday, the mate, says that they were shifted to make clear way for the cement. He would not, however, be sure that they did not shift any cement before they got to the Horn (Farraday, p. 46).

On October 12th, however, they did shift cement further aft, *and higher up in the ship, to ease the*

pitching and straining (Farraday, pp. 47-48) (Entry in Log, Oct. 12th).

This was *thirteen days* before they found it necessary to jettison cargo. At that time they raised it *as much as they could under the circumstances*. It eased her straining some, but was not sufficient to keep her from still straining hard (Farraday, p. 48).

This, in itself, would seem to be a physical demonstration of the fact that the vessel was laden with the center of gravity too low. *It indicated the cause of the vessel's behavior, and that the remedy was in the right direction, but insufficient in amount.*

Water in Hold Would Ease Her Straining Instead of Increasing it. — While *it is admitted that she labored too much after her decks opened*, suggestion is made that this is due to the entrance of water into the hold, but a moment's reflection will indicate that such would not be the effect of the water entering into the hold, and hence *the admission that she then labored too much, is in effect an admission of her previous unseaworthiness.*

It will be remembered that the cargo was stowed both in the between-decks and the lower hold. The water going down there would strike the cargo in the between-decks first. The cargo was of a nature that absorbed the water. As said by the master (p. 60): “The water *was absorbed by the cement, and did not* bring up in the bilge. There never was

more than two inches of water in the well." And the mate also calls attention to the fact (p. 45) that it was "*the top of the cement that was damp*". Nevertheless, when he went down below, off the Horn, he found the water coming through in such large quantities as to cause the vessel to sink deep in the water.

Under these conditions, no matter how deeply down the dampness penetrated the cargo, the larger quantity, if not the bulk of the incoming water *would be retained in the between decks and upper portion of the lower hold*. These large quantities of water remaining in the between decks would therefore *raise the weight* to the between deck, and tend to restore that equilibrium which should have been attained in the first place by placing a larger proportion of the cargo in the between decks.

Direct Proof of Improper Stowage.—The master testifies that "*the ship was naturally a beamy ship and a stiff ship,*" and in order to keep her as lively as possible, they began raising her cargo at the 6th tier, instead of at the 8th tier, as is usual in stowing cargoes at Antwerp. (P. 54.)

He is asked to explain the difference between raising the cargo and not raising it, and says: "*If we did not raise it the barrels would be stowed bilge and cuntling*. When you raise the cargo you put inch pieces of board over the 6th tier, which would raise the next tier, and so on" (p. 53). He thus

recognizes that if the vessel was in fact laden "bilge and cuntling" she was improperly laden and too stiff. His testimony that the tiers were raised is, however, directly contradicted by a disinterested witness, with equal, if not better, means of information.

Burk, the stevedore who unloaded the cargo at San Francisco, and has no interest in this controversy, says that the cargo was *not* raised in manner indicated, "*but was set bilge and cuntling*". It was raised about a foot from the bottom of the ship, and was a solid bulk of cement from the between-decks down; "there was a few boards scattered along the *main hatch*, and barrels were set on top of them, but from there aft, to both ends of the ship, there was nothing but cement, and it was set bilge and cuntling" (Testimony, p. 84). These boards were in the 4th tier below the between-decks, and were old pieces of lining boards, and were not in the body of the ship, but only in the main hatch (p. 85).

If this be true—and, because the witness was without interest in the controversy, it should be accepted in preference to that of the master—according to the master's own idea of what is *proper lading*, *this vessel was in fact improperly laden at the time she left Antwerp*.

The testimony of the two men cannot be reconciled, and the one is interested to discharge himself from the accusation of negligence, while the

other has absolutely no interest in the matter whatsoever.

Experts say Cargo Improperly Distributed. — The master states that the vessel was laden with 2350 tons in lower hold, and 928 tons in the between decks (pp. 54-55).

This, in the opinion of the experts, is improper lading and would cause the vessel to damage herself and open her seams. (*Wilson*, pp. 92-93; *Quayle*, pp. 104-106; *Steele*, p. 122.

There is a deposition in evidence from a stevedore at Antwerp, who did not personally direct the details of the work, and who answers the question (Interrogatory 6) "What knowledge had you of the method in which she was loaded, that is, as to the character and quantity of cargo which was placed in the different parts of the vessel?—that he does not know. He is then asked (Interrogatory 9), "If you know the way in which the ship was loaded, please state whether or not in your opinion she was properly loaded for the voyage from Antwerp to California?"—"As far as I can recollect after three years I *think* this ship was properly loaded, and in the usual conditions". But he does not know if she be a stiff or cranky ship, nor the number of tons in her hold or between-decks, nor any other details necessary to form a judgment, and his opinion is a doubtful one, based upon what appears to be a dim recollection. It certainly cannot have much weight (pp. 74-75).

An attempt was made by the libelant to get the testimony of the stevedore who did the actual work of lading, but when the commission arrived he was dead.

Damage Caused by Straining.—Of course the damage to the cargo was due to this straining of the ship. “That opened the seams.” “The more the ship strained the more the deck strained” (Master, pp. 60-61), and accordingly we find the entry in the log October 26th: “Found cargo saturated with water *through excessive straining of the ship and decks.*” Captain Quayle also said: “Straining opens the seams and makes her leak” (p. 106).

From the foregoing, it affirmatively appears that the vessel was by reason of her improper lading unseaworthy for the voyage in question, *when she started* and at all times thereafter and until the damage was done. Further, that the damage resulted directly therefrom. The language of the District Court used in the decision, convinces us that such must also have been his opinion, had his attention not been diverted from the issue, by the error already referred to with respect to the rule by which the liability was to be determined.

Restowage not in the Ordinary Course.—On page 27 of his brief, counsel quotes from §18 of *Carver on Car. by Sea*, to the effect that a ship may be seaworthy when she sails, although she could not safely

perform the voyage in the precise state in which she sailed, the illustration being that of hatches being off or port holes open, which, during the voyage would *in the ordinary course be closed when necessary*, but that is not analogous to the present case, nor is the suggestion of such an analogy warranted by the section cited, for in the same section it is said:

“Also the cargo taken must be a safe cargo for such a voyage as may be reasonably expected, *and it must be stowed so as not to be a source of danger*. In *Kopitoff v. Wilson*, one of a number of armour plates stowed in the ship broke loose during bad weather and went through her side, so that she sank. The jury found that *she was not reasonably fit to encounter the ordinary perils that might be expected on the voyage, owing to the manner of stowing the plates*; and that the loss was caused by that unfitness. Held, that the shipowner was liable for the value of the plates.”

So, too, the analogy sought to be established is lost in the fact that restowage of cargo on the voyage is not an act to be performed “in the ordinary course,” “after sailing.” It is rather extraordinary, and in order that the ship may have started seaworthy as to stowage, she must, as above indicated, have been so stowed as to be “reasonably fit to encounter the ordinary perils that might be expected on the voyage”, among which, it must be admitted that severe storms off the Horn are not the least important.

Charterers' Stevedore.—Some suggestion has been made respecting the vessel having been laden by the charterers' stevedore. The charter-party, however, provides, that "It is agreed that the lumpers and stevedores shall be under the direction of the master, and the owners responsible for all risks of loading and stowage." (Test. p. 130.) The master testified that the stevedores were employed by him, though selected by the charterers' agent, and the stowage was done under his supervision. (Record, p. 73.)

Under these circumstances, the ship is responsible for the bad stowage, if there be any.

The Sloga, 22 Fed. Cas. 346;

The Whitlieburn, 89 Fed. 527.

The Log.—Appellant has appended to his brief, excerpts from the log. As they are not sufficiently full to answer our purpose, we file herewith a complete copy of the remarks in the log covering the dates included in said excerpts.

II.

THE SHIP IS LIABLE BECAUSE OF THE FAILURE OF THE MASTER TO REPAIR HIS DAMAGE AT THE FALKLAND ISLANDS INSTEAD OF RUNNING TO AUSTRALIA WITH HIS DECKS IN THE VERY BAD CONDITION IN WHICH HE FOUND THEM AFTER ABANDONING HIS ATTEMPT TO ROUND THE HORN.

That the damage suffered off the Horn was very severe and rendered the vessel unseaworthy with respect to the protection of her cargo from water, must be admitted.

David Milne testifies that "When the decks commenced to leak they opened out and you could see the seams nearly, some of them, not all of them; one here and another there, right along the decks." The cement along the water way "was cracked in the way of the stanchions". The starboard bulwarks "were all stove in and the port ones also". (P. 25.)

Q. Where the bulwarks gave way, state whether or not water could get in?

A. Where the fastenings of the stanchions go through the plates.

Q. Could water get in there?

A. Yes, sir.

* * * * *

"A lot of rivets in the stanchions were gone; I think 9 stanchions in the between-decks and 10 in the lower hold where the rivets were all gone".

* * * (P. 26.)

Speaking of the deck beams, he says: "The one before the foremast, the stanchion was gone from the between deck beam, that is, the stanchion before the foremast."

Q. What effect had that?

A. The deck rose up.

Q. It raised the deck, did it?

A. Yes, sir.

* * * * *

"The stanchion being gone that would allow the deck to warp."

Q. What would the seams do?

A. They would open (pp. 26-27).

They stopped at Sydney to make these repairs; they were of such a nature they could not make them on the voyage.

Q. *I suppose you became aware of that fact when you were off Cape Horn?*

A. *Yes, sir.*

Q. They were of such a nature that you could not repair them on the voyage?

A. No, sir, unless you put into port." (P. 32.)

Johnson, the master testifies to the same effect. Of the damage, he says, among other things, they "twisted the bulwarks on both sides, started the bulwark stanchions on both sides, cracking the cement around them," (p. 59) and that this had the effect to strain the decks and open the seams. (P. 60.)

Q. Do you know whether or not water got into

the ship by reason of the cracking of the cement near the waterways and the fastening of the stanchions loosening?

A. Yes, sir, you could trace the water down the ship's sides now. Captain Metcalf saw that when he was on the ship at the dock here. (P. 60.)

Speaking of 9 stanchions in the between-decks loose at the head, and 10 in the lower hold, he is asked:

Q. What effect did that injury at the time that it happened, have upon the stability of the decks?

A. It would leave the decks free to move. There is no doubt their being carried away increased the opening of the seams. (P. 65.)

* * * * *

Q. *This cracked condition of the cement, what would that indicate to you with reference to the working of the sides of the vessel?*

A. *It indicated in all probability that the stanchions were started; that there had been a movement.*

Q. *You noticed that while you were off the Horn, did you not?*

A. *Yes, sir.* (P. 68.)

Notwithstanding this, the master started upon a two months' voyage from Cape Horn to Sydney (Milne, p. 33), where they stopped to repair the damage instead of, for that purpose, putting into the Falkland Islands but a few miles distant, with a fair wind (pp. 111, 124), and almost in the line of their run to Sydney.

During this run to Sydney they had an exceptionally heavy passage. Milne testifies:

Q. You had some heavy weather between Cape Horn and Sydney?

A. Yes, all the way nearly.

Q. All the way, nearly?

A. Yes, sir.

Q. Decks full of water, I suppose?

A. Yes, decks full of water. (Milne, p. 31; Johnson, p. 68.)

Under these circumstances, the master was not exercising ordinary human foresight and prudence in the care and custody of his cargo. Certainly in carrying a perishable cargo two months, under open decks almost constantly covered with water, he must have known that his cargo was receiving further and additional damage.

The Legal Duty Under the Circumstances.—With respect to the duty of the master under such circumstances, the rule is laid down by *Kent*, 3 Comm. 213, in the following language:

“In the course of the voyage the master is bound to take all possible *care of the cargo*, and he is responsible for every injury which might have been prevented by human foresight and prudence and competent naval skill. He is chargeable with the most exact diligence.”

This language is quoted with approval by Judge Hoffmann in the case of *Speyer v. Mary Belle Roberts*, 2 Sawy. 1.

It is the rule that if the damage arose by peril of the sea, the master is bound to use every means shown to have been available *to preserve the cargo from further damage*, and in the case of *The Sloga*, Fed. Cas. 12,955, the Court accordingly laid down the principle as a rule of law "too well settled to require any extended comment", that

"The ship does not excuse damage to the cargo *as caused by peril of the sea*, if the damage could have been prevented notwithstanding the peril encountered, by the utmost exertions of the master and crew and the full use of all the resources at the command of the ship." (p. 347.)

In that case a damaged cargo of sugar was delivered to libelants, and among other defenses the claimant set up a peril of the sea. Severe weather, as bad indeed as anything disclosed in the case at bar, was shown, and described in such graphic language as: "Awful gale breaks out with such a heavy sea that the deck is filled with water, washing away kitchen, fowl baskets, etc. * * * A furious gale and deck continuously under water. About 2 P. M. the wind nearly oversets the vessel, rendering her steerless." And the captain testifies that the first gale lasted about 24 hours, so that they had to lay to, losing some sails, the kitchen and some of the bulwarks. The mate testifies that during the gale she was on her beam ends ten or fifteen minutes, and that the carrying away of her sails righted her.

In passing, it will be observed that *notwithstanding* this very severe weather, the vessel *did not open her decks*.

In summing up, the Court said:

“Upon the whole testimony I do not think that I should be warranted in holding that the ship has shown that she encountered such perils of the sea adequate to account for the damage, *and uncontrollable by the resources at the command of the ship*, as will account for the damage, and throw upon the libelants the burden of making out a further case of negligence. In this posture of the case it is not for the libelants to prove affirmatively how it was that the water rose in the ship so as to submerge the cargo. *Negligence of the ship is presumed from the fact that the damage was done, and that the means of preventing it were at hand.*”

The decision concludes with the observation:

“On the ground, therefore, that the ship has failed to show that the damage to the cargo was caused by a peril of the sea, and that it is proved that it was caused, *in whole or in large part*, by insufficient stowage and dunnage, there must be a decree for the libelants.”

The matter was accordingly referred to the commissioner to compute the damages.

The case of *The Shand*, Fed. Cas. 12,702, referred to in the above case of the “*Sloga*”, is a leading case upon the subject in this country. In that case a cargo of sugar was delivered in a damaged condition. The defense was that the ship sprung a leak on the voyage by reason of violent storms and

stress of weather, and that the damage was the result of this leak. The vessel had experienced very bad weather, and was compelled to jettison part of her cargo, and the Court found the proof sufficient to show that the circumstances of danger under which part of the cargo was jettisoned, was such as to justify the act. That it was done under reasonable apprehension on the part of the master that the ship might founder, and for the purpose of checking the leak and for the safety of all concerned. That therefore that part of the defense was clearly made out.

When the vessel arrived at quarantine in New York the crew was exhausted with constant working at the pumps, and a gang of men was telegraphed for, and after their arrival, at the first sounding they found nearly 9 feet of water, on the second sounding, within an inch of 10 feet of water in the hold, but the men were able to control the leak with the ship's pumps. As soon as possible after the arrival of the vessel at the pier, a steam pump was put to work and worked continuously until the next morning, when the pump sucked. The pumping then stopped for some time, and during the interval that no pumping was done, the water again rose in the vessel higher than it had ever been before. After the discovery was made of this leak, the steam pump was started again and the ship pumped out and thereafter kept pumped out.

For the loss occasioned by these two floodings, the libelants claim damages, and the claimants insist that it was to be attributed to the same peril that had caused the original damage, that the leak in the ship "was a continuing peril", and the Court said:

"Assuming that the leak in this ship was caused by a peril of the sea, and that this loss now in question resulted from the same leak, the question is, what is the duty of the ship *in protecting the cargo against a peril which threatens its safety*, or, which is the same thing, against damage *which threatens to result from an injury to the ship caused by a peril of the sea*. The duty of the ship to the owner of the cargo, in this respect, has been so *conclusively determined in this country*, that it is necessary only to quote the language of the Supreme Court in the case of *The Niagara v. Cordes*, 21 How. 7."

We will not undertake to give the whole quotation from the Supreme Court decision, but content ourselves with so much as we think illustrates the principle we wish to elucidate. Speaking of the duties of the carrier by water to his cargo after injury from excepted perils, the Supreme Court says:

"Such disasters are of frequent occurrence along the seacoast in certain seasons of the year, as well as on the Lakes, and it cannot be admitted for a moment that the duties and liabilities of a carrier or master are varied or in any manner lessened by the happening of such an event. *Safe custody* is as much the duty of the carrier as conveyance and delivery, and when he is unable to carry the goods forward to their places of destination, from causes which he did not

produce, and over which he has no control, as by the stranding of the vessel, *he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury that might have been prevented by human foresight, skill and prudence.*" (P. 1158.)

In the course of his observation upon this subject, the District Court says:

"Such preservation and protection are of the very substance of the ship's contract, with the cargo-owner, and therefore what the master does in that regard is done for the ship, and there is no necessity for creating, by a legal fiction, any new agency to authorize or require him to do this duty toward the cargo." (P. 1159.)

Concerning the contention that after the ship is wrecked or stranded the master was only liable for reasonable diligence and care, the Supreme Court further said:

"Judge Story refused to sanction the doctrine, and held that his obligation, liabilities and duties as a common carrier still continued, and that he was bound to show that no human diligence, skill or care could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract as universally understood in courts of justice." (P. 1158.)

The District Court concludes that the cases

"Are conclusive to the point that the master was bound by the contract of affreightment upon the happening of the disaster which befell his ship, the springing of the leak, to em-

ploy all possible means within his reach, to protect the goods against the danger which the leak threatened them with. * * * Such preservation and protection are of the very substance of the ship's contract with the cargo owner", etc. (P. 1159.)

The Court suggests in that case that the English cases show that the English Courts do not hold the ship to so strict a liability as our courts for preventing damage to cargo from the effect of a threatened peril, but not only does the District Judge point out the error in that conclusion, but we shall also presently see that in this respect the American law is controlling because of the provision of the Harter Act. See *Botany Worsted Mill Co. v. Knott*, hereafter cited.

This case is also instructive upon the question of the amount of proof necessary to establish the case for libelants, and announces the principle that notwithstanding the ship may show that the damage resulted from a sea peril, if the evidence also shows *that there was available to the master means of avoiding the damage which threatened the goods, it is sufficient to charge the ship.*

"The proof of that, and the further admitted or proved circumstance that the danger was not averted, is evidence from which the presumption of negligence in the use of those means at once arises. It is, unexplained, sufficient proof of negligence. The presumption is of the same general character as that presumption of negligence which arises in the first instance upon proof of the failure to deliver the goods in an undamaged condition." (pp. 1160-1161.)

Applying these principles to the case at bar, we have, if it be admitted that the damage to the ship was the result of a sea peril instead of unseaworthiness, a ship with open decks and the means at hand to repair them, of which means the master does not avail himself, but proceeds on a two months' tempestuous voyage before attempting to remedy the injury. It will not be contended that human foresight, skill and prudence were exerted in this respect, but must be admitted that the master in so doing failed in the *proper care and custody of the cargo*.

The principle we contend for was also recognized by the Supreme Court in the case of

The Portsmouth, 9 Wall. 682, 7.

where a vessel was stranded and unnecessarily jettisoned part of her cargo, and the Court said:

“Were it necessary, it would be easy to show that the conduct of the master after the vessel was stranded was entirely unjustifiable. It was his duty even then to take all possible care of the cargo. He was bound to the utmost exertion to save it. Losses arising from dangers of navigation, within the meaning of the exception in the bill of lading, are such only as happen *in spite of the best human exertions*, which cannot be prevented by human skill and prudence. *The Niagara v. Cordes*, cited above.”

English Cases.—Although, as suggested by the Court in *The Shand*, the English cases be less strict than the American in the degree of care required by the

master in protecting the cargo from a threatened peril, yet they are sufficiently strong to charge the vessel under the facts in the case at bar.

The Rona, 5 Asp. Mar. Law Cas., New Series, 259. (1884.)

The *Rona*, a wooden vessel, under a charter from the port of New York to London, with a cargo of grain and flour, left her moorings and was towed down the New York River, and on her way stranded on the Craven Shoal, which is about 10 miles below New York. A tug towed at her for an hour and three-quarters before she was got off. During that time her decks and waterways were much strained, and she was then found to be making 5 inches of water an hour. But the master did not examine her, or cause any repairs or caulking to be done, but proceeded on the voyage and encountered very severe weather. On her arrival in London, the flour of plaintiff, which was immediately beneath the deck, was found to have been damaged by the sea water having made its way through the deck.

Under these circumstances, it was held that it was *the duty of the master to have returned to port and repaired his ship before proceeding upon the voyage*, and having failed to do so, the ship was liable for the whole damage, unless the master was able to distinguish what portion of the damage did not arise from the negligence which had thus been established against him.

It was further distinctly affirmed that the Court *would not assent* to the proposition that the liability of the owner depends upon *the honesty of the belief of the Captain that what he proposes to do is the right thing.*

The decision touches upon many questions of interest in the present controversy, and will well repay a perusal. How nearly parallel in material facts it is to the case at bar will be indicated by the following language of the Court, where it is said:

“We are advised that one obvious thing which he might have done, was this, that when he saw, as I am assuming that he did, that the vessel had been so strained and had received such a shock that her waterways and decks were strained, and that in some way or other she was making five inches of water per hour, that ought to have indicated that he should, at least, have taken the precaution of having the water ways and the decks caulked for the purpose of preventing the water going through, as it was able to do if she encountered any bad weather, such as she did encounter at that season of the year.

“There is, therefore, in the judgment of those who assist us, one plain element of negligence which would, if it had not been committed, from the precaution which has been mentioned, have had a tendency to prevent the saturation of the deck with water and the penetration of water into the hold.”

In this connection it will be borne in mind that in the case at bar there is but one interest to be considered, as the cargo is a single con-

signment. It is further admitted that "all the facilities necessary for effecting repair * * * could have been had at Port Stanley in the Falkland Islands"; (p. 148) yet the master squared away for a port of repairs several thousand miles distant. Hence, delay and expense are elements entering in the determination of the question only so far as they tend to *convict* the master, for the course he took *increased* both the delay and the expense by the difference in time and expense between that required to go around the globe, and that required, after having repaired at the Falklands, in returning the 360 miles to the point of departure off the Horn, thence to continue his voyage.

We notice appellant's suggestion (Brief p. 7) of probable "further injury to cargo" and "enormous expense" if repairs were made at the Falklands, but there is no evidence of such facts further than the statement in the supplemental testimony of the master, wherein he attempts to avoid the stipulated facts above referred to concerning the facilities for repair at the Falklands. Neither does it appear that this "enormous expense" can exceed the "enormous expense" of a trip around the world requiring six months in excess of the time required for an ordinary voyage. (pp. 65-66.)

Consider also, that during two months of said additional voyage, her decks were open, whereby "further injury to the cargo" was certain, while

on the other hand, no reason is given for "further injury to the cargo" in the Falklands as a port of distress that would not apply equally well to Sydney as a port of distress.

Further considering the English cases, we have

Worms v. Storey, 11 Exch. 427 (1855).

Vessel was to proceed to Cardiff and load with coal, and then take coal to Havre.

Declaration: "After the commencement of the voyage, the said vessel was greatly damaged by the dangers and accidents of the seas, and the defendant had notice that the said vessel was then unseaworthy, and the said vessel was then in a place where she could and might and ought to have been repaired, before she proceeded on her said voyage, of which the defendant then had notice, yet the defendant did not cause the said vessel to be repaired before she proceeded on her said voyage, and the defendant carelessly and negligently caused the said vessel to proceed on the said voyage with the said coals on board, in an unseaworthy state and condition. In consequence a large quantity of coal had to be thrown overboard."

Held—on argument of demurrer:

"It is clear to my mind that the breach is sufficient. Under a charter-party containing such an exception, if the vessel sails in a seaworthy state, and in the course of the voyage is damaged by perils of the sea, the owner is not bound to repair it, but if he does not choose to repair, he ought not to go to sea with the vessel in an unseaworthy state, and so cause a loss of the cargo. He ought either to repair it or stop. * * * In order to make out negli-

gence here it must be proved that he proceeded with the vessel in such an unseaworthy state that he was obliged to throw the goods overboard. If so, the loss was the consequence of the wrongful and negligent act of the defendant, and for that he is responsible.”

In conclusion, we suggest that the facts in the case at bar are very much stronger in favor of putting into Port Stanley than were those in the case of *The Iroquois*, where this Court held the ship liable. Here the vessel actually turned back with Port Stanley in her return course but a very few miles distant, and the damage to be avoided was damage to the cargo—almost the first concern of the ship. Whatever, therefore, may be said with reference to the duty of the master to put into Port Stanley under the facts in *The Iroquois* case, the facts in this case leave no room for argument.

The Master’s Judgment as a Guide.—It is contended by appellant that “the ship’s change of course to the eastward and her failure to put into the Falkland Islands as a port of refuge, were matters which must be determined by the master in the exercise of a conscientious and prudent judgment. For an error in his action, if events afterwards should prove there was one, the owner cannot be held liable.” (pp. 6-7.)

In support of the contention a case is cited from the Maine Reports. The following expression of the Supreme Court upon the subject, should, how-

ever, set the question at rest. After referring to the rule that negligence must be determined upon the facts as they appeared at the time, and not by and from actual consequences which were not to be apprehended by a prudent and competent man, the Court says:

“But it is a mistake to say, as the petitioner does, that if a man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury, or laid down by the Court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it ‘should be co-extensive with the judgment of each individual,’ was exploded, if it needed exploding, by Chief Justice Tindal in *Vaughan v. Menlove*, 3 Bing. N. C. 468-475. And since then at least, there should have been no doubt about the law.”

Ocean Steam Nav. Co. v. Aitken, Supreme Court Advance sheets, April 1, 1905, p. 318.
See, also, *Compania, etc., v. Brauer*, 168 U. S. 104.

In this connection it must not be overlooked that, in this case, “the facts as they appeared at the time” would have warned any prudent man to seek the nearest port for repair. With the knowledge that his decks were open and leaking, a perishable cargo underneath, he cannot claim to have exercised “a conscientious and prudent judgment”. In the *Rona* the Court did not think it prudent.

The Master's Deposition.—In the face of the positive testimony (referred to on pp. ante), the following statement is made in appellant's brief, p. 4:

“Inasmuch as the libel had charged no fault in the captain of the ‘Musselcrag’ in this respect, and the master had not been examined or *cross-examined* on the subject, and inasmuch as there was nothing in the evidence (*as we thought*) showing the knowledge of a probable injury to cargo such as would demand that the master turn back on his voyage at that time, etc. * * * we submitted the cause without further examination of the master, he having long before left the jurisdiction. After the decision his evidence was taken for use on appeal. It shows clearly three things: 1st, *His ignorance that the cargo was in a seriously damaged condition at the time he bore away for Australia*; 2nd, *The fact that the condition of his ship did not require such action,*” etc.

We leave it to the Court in view of the foregoing testimony, and the testimony regarding the condition of the cargo and leakage preceding the jettison [not to speak of the jettison itself and reasons assigned therefor (pp. 66-67-68)] whether or not it be true that the captain was ignorant that the cargo was in a seriously damaged condition at such time, as well as whether or not the condition of the ship did require such action.

Regarding the claim that the libel charged no

fault in not returning to Port Stanley for repairs, and that the master was not cross-examined thereon, we must, with all deference to counsel, say that the suggestion is a weak attempt to excuse himself for trying his case on a wrong theory. The libel is in the usual form, the captain was cross examined as to his position at the time of putting back (p. 70), his knowledge of the damage to his ship and cargo, the nature of the weather he encountered to Australia, the likelihood of additional damage to the cargo on said voyage, *why* he made repairs in Sydney, whether it was reasonable to expect any worse weather across the Pacific than that encountered running to Sydney (p. 71)—all pointing directly to the contention that he should have put into a nearer port of distress.

That counsel then appreciated the purpose of that examination, is evidenced by his re-direct question:

“Q. After beginning to make your easterly course, were you in a condition to do anything towards improving your decks? (p. 72.)

More pointedly still, *a year and a half before the trial* we informed counsel that we desired to take testimony respecting the facility for repairs at Port Stanley, which resulted in the stipulation (Record p. 148) that “it shall be taken as a fact admitted to be true that *all the facilities necessary* for effecting repair of the injuries to the ‘Musselcrag’ occasioned during her voyage up to the time she reached about

the latitude of the Falkland Islands, could have been had at Port Stanley in the said Islands.”

Under these circumstances it is not fair to contend that counsel was not fully advised of our position over a year and a half before the trial in the lower court—ample time to take any testimony he might have required. We think it must be confessed that the true explanation of his action in that respect lies in the single fact, taken from the above mentioned statement of his brief, that “inasmuch * * * as it seemed that any fault thus committed, if there was one, was ‘a fault or error in the navigation or management of the ship’, and within the protection of the Harter Act, we submitted the cause without further examination of the master, he having long before left the jurisdiction.” (P. 4.)

This brings us to a consideration of the Harter Act.

III.

THE LOSS IS NOT A “LOSS RESULTING FROM FAULTS OR ERRORS IN NAVIGATION OR IN THE MANAGEMENT OF THE VESSEL”.

1. We have seen from the foregoing decisions, that the ship’s liability in this matter rests upon the failure of the master in the *care and custody of the cargo*. It is not the case where the master failed to make use of the appliances furnished by the

owner, but it is the failure of the master after his vessel had become unseaworthy, to do those things which it was incumbent upon the owner to do to render her seaworthy. To use an expression describing the difference between the duties of an agent, under the law of master and servant, to provide safe tools, and his duties in the use of those tools when provided, the shipmaster, in respect to the duties here required of him, is a vice-principal.

But the Harter Act makes a plain distinction between the negligence of the master in respect to the *care and custody of the cargo*, and that in respect to the "management" of the ship. For a failure in the former respect, so far from excusing the ship, the Harter Act *emphasizes the liability* by enacting that any stipulation to relieve the owner from negligence in that regard *shall be void*. (§1.)

Section 3, relating to errors in navigation and management, must be read in connection with Sec. 1, and must be so construed as not to avoid or "contradict the evident and particular intent of the first section." This question of construction was carefully considered by Judge Brown of the Southern District of New York, and his reasoning and conclusion affirmed by the Circuit Court of Appeals and the Supreme Court of the United States. The matter is, therefore, beyond discussion.

Botany Worsted Mills v. Knott, 76 Fed. 585,
D. C.;

82 Fed. 471, C. C. A.;
179 U. S. 69, Sup. Ct.

In that case the vessel started on her voyage seaworthy, but in the discharge of cargo at way ports, her trim was changed so she became down by the head, thus causing drainage toward the stem and injuring cargo forward. It was contended that this was error in the "management" of the vessel under the Harter Act, but the Court held that it was negligence in the "stowage", which is embraced in the same section of the Act, and subject to the same conditions as "care and custody"; that

"The evident intent is that ship and owner must answer for such damages. The general words of the third section, 'management of the vessel', cannot receive a construction which would contradict the evident and particular intent of the first section. The different parts of the same act must be construed harmoniously so far as possible. The scope of a general phrase must be restricted so as not to contradict the more particular provisions of other parts of the same act. And so here, since this damage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the primary cause, though that cause became operative through its effect on the trim of the ship, this negligence in loading falls within the first section. The ship and owner must therefore answer for this damage, and the third section is inapplicable."

The Court further points out the difference between what may be considered as "management of the vessel" and what "care and custody of the

cargo", and in the course of those remarks, refers to the language of the Judges in the case of *the Glenochil*, saying, among other things:

"It was further considered that the Harter Act is designed to 'prevent exemptions in the case of direct want of care in respect to the cargo, and to permit exemption in respect to the faults primarily connected with the navigation or with the management of the vessel, and not with the cargo.'

"In the same case, Sir Gorrell Barnes observes that it was a fault in the management of the vessel in doing something necessary for the safety of the ship herself; that in the first and third sections of the Harter Act 'there will be found a strong and marked contrast in the provisions which deal with the care of the cargo, and those which deal with the management of the ship herself; and that where the act done is done for the safety of the ship herself, and not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of said vessel.' "

(pp. 584-5.)

The Supreme Court, in commenting upon this distinction, says:

"The like distinction was recognized by this Court in the recent case of *The Silvia*, 171 U. S. 462." 179 U. S. 74.

We think we have made it sufficiently clear in the former part of this brief, that the failure to return to Port Stanley for repairs, was the failure to do an act necessary *for the protection of the*

cargo from damage which threatened to result from the injury to the ship caused by a peril of the sea.

The Shand, ante;

The Niagara v. Cordes, 21 How. 7.

The act thus required of him was, therefore, an act which should have been done primarily, if not entirely, for the protection of the cargo, and not at all for the safety of the ship. Hence it was not "management of the ship," within the meaning of the Act.

It follows that when appellant argues that "it is quite clear that the same rule must govern whether the ship is *so managed* that water goes through her decks, or that after it gets into the ship it is not pumped out", he befogs the issue. In the case of open decks the ship is *not* "so managed" that water goes through her decks, but, we have as to the cargo, an *unseaworthy ship*; one that, having due regard to the care of her cargo, requires immediate repair. On the other hand, the case of pumping out, or of closing the port hole (as in the principle cases cited by appellant), the vessel is perfect in her appliances, and it is the mere improper use of those appliances that is at fault. When the true nature of the act here complained of is borne in mind the primary object of which is to preserve the cargo, we should have no difficulty in determining, in consonance with the decisions, that the Harter Act does not relieve appellant from liability.

Why American Cases Holding Strict Liability, Controlling.—We suggest on page ante that because of the Harter Act the rule of the strict accountability under the American cases controls, rather than the less strict rule of the English cases. As already suggested, Section 1 of the act emphasizes the American cases, by making void any stipulation relieving the ship from liability for loss resulting from negligence in the “care and custody” of the cargo. The statute thus approves the policy of the American law as laid down by the Courts making the ship an insurer in that connection. Hence the rule laid down in *Botany Worsted Mills v. Knott*, 76 Fed. 585, applies, viz:

“Foreign law is administered only upon principles of comity. This cannot be allowed to subvert in our courts our own positive law, founded upon public policy, as respects contracts to be performed in part within our jurisdiction and in part upon the high seas.”

In the Supreme Court it was pointed out that the language of the 1st section and that of the 3rd section of the Act differed with respect to the description of the voyage to which the act applied, and it was contended that the 1st section did not apply to a British ship on voyage from a foreign port to the United States. The Court held, however, that it did apply.

2. There is also a suggestion that the Harter Act might relieve the ship from responsibility for loss claimed by us to be due to her original stiffness and improper lading, it being said that the regulation of the trim of the ship is a part of the management of the ship, and hence within the Harter Act, where such regulation is done, or should be done primarily with reference to the ship for the benefit of the ship. (pp. 27-29.)

This, however, assumes that the ship *started seaworthy as to stowage*, and that she afterwards required to have her trim changed to meet different conditions. We have, however, already seen that in order to start seaworthy as to stowage, the vessel must be so stowed as to be *prepared to meet all kinds of weather that might reasonably be expected on that voyage*, and if the Court finds that she was not in fact seaworthy in this respect, no question of the Harter Act can arise.

As said by the Supreme Court in *Knott v. Botany Worsted Mills*, p. 74, quoting from the case of *The Ferro*, "mere stowage is an altogether different matter from the management of the vessel". * * * There is no such thing as stowing a vessel, bound on such a voyage with a homogeneous cargo, with the expectation that she shall be restowed en voyage to enable her to meet varying conditions of weather. Hence, the analogy of an open port hole, to be opened or closed as the weather demands en voyage, is inapplicable.

We respectfully submit that the judgment of the District Court should be reversed, and judgment ordered for libelant for the full amount of its damages.

NATHAN H. FRANK,
Proctor for Appellee.



APPENDIX I.

“XIII. The voyage began the 5th day of January, 1884, and the vessel actually got to sea on the 7th, when she encountered a strong northwest gale. The light sails were furled and the mainsail and foresail double reefed. The gale caused her to labor heavily and ship large quantities of water, some of which entered the cabin and reached the cargo. The vessel was driven out of her course and into the Gulf Stream. The gale moderated somewhat the latter part of the day, but the vessel still continued to roll heavily and shipped plenty of water. The pumps were attended to and the vessel was found to be making considerable water. The next day the gale continued, with a very heavy sea running, until about 4 P. M. when it moderated, and at 6 P. M. topsails were set. The latter part of the day there was a strong breeze, and two reefs were made in the spanker. The vessel made little water this day. The next day, the 9th, began with a strong southeast breeze, which freshened to a strong gale. Two reefs were made in main and foresails. At 4 P. M. the spanker and jib were furled. The middle part of the day there was a very sharp gale and heavy sea running. The vessel labored heavily and shipped great quantities of water. The pumps were carefully attended to, and she was found to be making considerable water. The latter part of the day the wind was still increasing and the foresail and the forstay sail were furled. It was then blowing a

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'living' gale from the westward. The weather through the night continued to be extremely severe; there was a 'terrific gale of wind.' Planks were carried away from the bulwarks of the starboard side of the vessel, also one of the ports; the waterway on starboard side was started off. The covers of the chain locker and a spar were found loose in the morning, floating in the waist of the vessel on both sides. Coal washed about decks; also buckets and bucket racks; also pieces of bulwark. The forecastle door and galley door were washed off, but were not lost. The men could not stand at pumps on main deck because it was continually swept by the seas, and it was with difficulty that they were able to work at the pump on the poop deck, which was about four and a half feet higher than the main deck, on account of the sea breaking over. Before midnight the vessel was hove to under a storm trysail, two reefed foresail, and forestaysail on the port tack. The vessel was shipping water through the cabin windows, doors, and down the booby hatch. The cabin was situated in the after part of the poop deck. The top of the cabin house was about three and a half feet above the deck. They commenced to take water in the cabin while eating supper, and all through the night it forced its way in. This was unusual and indicated very bad weather and a rough sea. Everything in the cabin was drenched, excepting the berths, with water washing around the cabin with motion of vessel.

Water reached the cargo during the night through the cabin, a strained waterway, and otherwise. The pumps were tried every two hours, and by four o'clock Thursday morning it was discovered by the pumps bringing up guano with the water, that the cargo was wet. The master of the vessel did not go to bed during the night, but was mostly on deck. Previous to 4:30 o'clock in the morning they were able to get a suck on the pumps, indicating that there was not water then in the well, but after that they were unable to do so. At this time the weather was very bad, a very bad sea flooding the decks continually and washing everything movable about. About five o'clock they sounded and found eighteen inches of water in the well. In about half an hour afterwards they wore ship, putting the vessel before the wind, so that the men could stand at the pumps. This gave the vessel a list to port. The only outlets on the port side for the seas that came aboard were the open port above mentioned and the scuppers. They continued pumping, but still were unable to get a suck, and at nine o'clock soundings showed about seven feet of water in the vessel. Preparations were then made to abandon the vessel, as she was supposed to be sinking. The lashings of the boat on the poop deck were cut and the women on board came up from the cabin to take the boat. Between ten and eleven o'clock they wore ship and the vessel slowly righted up, the booms swinging from the port to the starboard side, bring-

ing the port side out of the water. The vessel was then working heavily in the sea, losing steerage way and settling fast. When the vessel righted up and rolled her lee side out of the water, the second mate, who with others fastened with lines to prevent them from being washed away, was working at the pump on the main deck, heard a heavy gurgling sound, and let go the pump and went over to the port side, put his hand against the rail, and looked down under it to where the bilge pump plate was, and saw a hole large enough to put his hand in. He ran his hand and arm down the hole and sung out to the captain, 'Look here!' Being greatly excited and not looking for such a thing he hardly realized what the trouble was. The captain came and said, 'My God, this is the bilge pump!' It was found that the whole bilge pump plate, with the screws, was gone."

38 L. Ed., p. 688.

Corrected copy

No. 1167.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

C. W. CORSAR et al.,
Owners of Ship "Musselcrag",

Appellants,

v.

J. D. SPRECKELS & BROS. CO.,

Appellees.

BRIEF ON BEHALF OF APPELLANTS,
CORSAR ET AL.

PAGE, McCUTCHEN & KNIGHT,
Mills Building, San Francisco, Cal.
Proctors for Appellants.



No. 1167.

IN THE
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BRIEF ON BEHALF OF APPELLANTS,
CORSAR ET AL.

The Ship "Musselcrag," owned by the appellants, sailed for Antwerp, laden with a cargo of cement, on the 19th day of July, 1899, bound for San Francisco. On the voyage, after reaching the neighborhood of Cape Horn, she encountered most tempestuous weather. The log book, from which the extracts printed as an appendix to this

brief are taken, shows gales of extraordinary severity beginning about the 16th of September, and continuing, with hardly the slightest abatement, until the fourth of November, *about fifty days*, at the end of which time, as the log shows, the head winds, the incessant rolling of the ship in the heavy seas which threatened to tear out her masts, the damage which the ship had already received in her rigging, and the prostration of the crew, compelled the master to look to some easier means of making his voyage than by rounding the Cape. He had already been forced to jettison cargo to save the ship from foundering (Tr. *Johnston* 66). He, accordingly, put his ship before the wind and shaped his course for the Cape of Good Hope. At this time his position was 56.34 S. and 60.34 West, about sixty miles from Staten Island (*Johnston* Tr. p. 70) and about three hundred and seven miles from Port Stanly, in the Falkland Islands (*Johnston* Tr. p. 155, answer to Int. 6). At the last named port, if the master had sought it, there were means of repairing the ship. The voyage, for many days after the course had been changed to the eastward, continued in heavy gales until about December 9th, when an interval of a few days of less stormy weather came in and lasted until the ship made Sydney, as a port of refuge. The decision to stop at Sydney was made on November 21st, because the ship's yards were in danger. At the last moment, the steering gear broke down in part.

When the ship arrived at San Francisco, her passage having been one of 313 days whereas, ordinarily, it

should not have exceeded 140 (Tr. *Johnston* pp. 65, 66), it was found that water had to a considerable extent damaged the cargo of cement. The ship was libelled by the consignees, it being charged that the damage was due to the ship's unseaworthiness and negligence. On the trial, it was urged that the ship was badly stowed at Antwerp; that too much cargo had been put in her lower hold, so that she was stiffer than she should have been. It was further urged that the master, when he was faced with inability to round the Horn, was guilty of fault in not having shaped his course for Port Stanly, in the Falkland Islands, at which place his ship could have been repaired. It was claimed that the damage to the cement must, necessarily, have taken place to a great extent during the succession of gales which occurred on the ship's voyage after she turned to the eastward.

The court below decided that the ship had been properly stowed, and that she was seaworthy. It held with the libellant, however, that she should have put in for repairs at Port Stanly, and for failure to do this, charged her with half of the damage done to the cement, upon the assumption that the damage done by sea perils prior to the time of the change of course might fairly be set down at one-half of the whole damage. It further relieved the ship from liability for the 440 barrels of cement jettisoned.

When this decision was made, the court had before it the following facts:

a. The captain's testimony that his position at the time of changing his course was in the latitude and longitude already stated.

b. The stipulated fact that the means of repair of ships were to be found at Port Stanly.

c. The testimony of two or three shipmasters that winds available to the "Musselcrag" in sailing for the east when she did, were available to make Port Stanly, if the master had desired to go there.

Inasmuch as the libel had charged no fault in the captain of the "Musselcrag" in this respect, and the master had not been examined, or cross-examined on the subject, and inasmuch as there was nothing in the evidence (as we thought) showing knowledge of a probable injury to cargo such as would demand that the master turn back in his voyage at that time, and, inasmuch, further, as it seemed that any fault thus committed, if there was one, was "a fault or error in the navigation or management of the ship" and within the protection of the Harter Act, we submitted the cause without further examination of the master, he having long before left the jurisdiction. After the decision, his evidence was taken for use on this appeal (pp. 152 *et seq.*). It shows very clearly three things: *first*, his ignorance that the cargo was in a seriously damaged condition at the time he bore away for Australia; *second*, the fact that the condition of his ship did not require such action; *third*, the fact that he exercised his honest judgment and discretion, based upon an experience of a third of a century

in those waters, in seeking protection of ship and cargo by sailing to the east.

Assignments of Error.

1:—The court erred in entering its decree in favor of the libellants in the sum of \$2,852.58.

2:—The court erred in not dismissing the libel.

3:—The court erred in its finding that it was the duty of the master to seek the Falkland Islands and in holding it to be negligence on his part that he did not do so.

4:—The court erred in its finding that the act or omission of the master, if such it was, in not seeking the Falkland Islands, was not a fault or error in the navigation or management of the ship, within the protection of the Harter Act.

We shall submit to the judgment of the court three propositions, all of which we believe will be sustained by the record and by the law. The third proposition is intended to meet the appeal by the consignees on the ground of the alleged unseaworthiness of the ship.

First:—The ship's change of course to the eastward and her failure to put into the Falkland Islands, as a port of refuge, were matters which must be determined by the master in the exercise of a conscientious and prudent judgment. For an error in his action, if events afterwards should prove there was one, the owner cannot be held liable.

Second:—If there was error in the master's failure to put into the Falkland Islands, it was an error committed in the management and navigation of the ship, for which under the Harter Act, the owner is not responsible.

Third:—The appeal of the cargo owner that the ship was unseaworthy for the voyage is not sustained by the evidence. The loss which fell upon the cargo was due to sea perils only.

I.

THE SHIP'S CHANGE OF COURSE TO THE EASTWARD AND HER FAILURE TO PUT INTO THE FALKLAND ISLANDS, AS A PORT OF REFUGE, WERE MATTERS WHICH MUST BE DETERMINED BY THE MASTER IN THE EXERCISE OF A CONSCIENTIOUS AND PRUDENT JUDGMENT. FOR AN ERROR IN HIS ACTION, IF EVENTS AFTERWARDS SHOULD PROVE THERE WAS ONE, THE OWNER CANNOT BE HELD LIABLE.

Regarding the duty of the master in such cases, the English Court of Appeal said:

“In considering what is reasonably possible, or reasonably necessary, every material circumstance must be taken into account, *e. g.* danger, distance, accommodation, expense, time and so forth. No one of these can be excluded.”

Phelps v. Hill, 1 Q. B. (1891) 611.

Capt. Johnston has now given his reasons at large (Tr. pp. 155, 156). The distance he would have had to run to the Falkland Islands was 307 miles. On the 4th of November, he did not know of any necessity for seek-

ing a port of refuge. The damage to the ship which afterwards drove him into Sydney was not known until weeks afterwards, when opportunity offered to examine conditions below decks. The continuous bad weather at those islands, had he known, when he turned eastward, of the extent of the damage to his ship, would have advised against seeking them, because of the delays to be expected in the repairing. Besides this, the scarcity and uncertain ways of workmen there who were to be had from a population of 600 to 700 (*Encycl. Brit.*) would delay repairs, further injure the cargo and cause an enormous expense, not to ship alone, but in part, in general average, to the cargo. These islands are notorious to all ships and owners of cargo, as the port of ports for inordinate expenses.

Capt. Johnston believed he would, soon after changing his course, strike better weather. Altogether, in the exercise of his judgment as a prudent, experienced shipmaster, these considerations appealed to his resolution most strongly (*Johnston*, pp. 155-157).

In the case *Turner v. Protection Co.*, 25 Me. 515 (quoted as authority by the English Court of Appeals in the case above cited), it was said:

“The master in most cases must be the principal judge of the degree of peril to which his vessel is exposed and of her ability to proceed with safety to a nearer or more distant port and of the facilities for repairing her at different ports. If he is competent and faithful, his decision respecting these matters, made in good faith, should be satisfactory to all interested, although he may err in judgment.”

Capt. Johnston says:

“When I bore away to the eastward, *I believed my ship was in a fit condition to carry her cargo safely to San Francisco without any repairs.* My object in going east was to complete the voyage to San Francisco as soon as possible under the circumstances. * * * I further considered that the most prudent and proper course to pursue was to get my cargo to its port of destination as quickly as possible and without detention for repair and probable discharge and re-stowage.”

(*Johnston*, pp. 155, 156.)

“It is a general principle of law, that every man is presumed to do his duty until the contrary is shown; and *a fortiori*, this doctrine applies to the perilous responsibility of a master in ordering a sale of his ship.”

Robinson v. Commonwealth, 3 Summ. 227.

We submit, that in the conceded facts, the master of the “Musselcrag,” an experienced and prudent officer, not only did not commit a legal fault, but that his action was beyond criticism.

II.

IF THERE WAS ERROR IN THE MASTER'S FAILURE TO PUT INTO THE FALKLAND ISLANDS, IT WAS AN ERROR COMMITTED IN THE MANAGEMENT AND NAVIGATION OF THE SHIP, FOR WHICH, UNDER THE HARTER ACT, THE OWNER IS NOT RESPONSIBLE.

The Harter Act provides in its first and second sections (27 St. 445) that it shall not be lawful for the master or owner of a vessel to insert any clause or agreement in a bill of lading whereby he

“shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge.”

Section 3 provides that if the owner

“shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel.”

The court below found that the “Musselcrag” started upon her voyage in a seaworthy condition in all respects. The presumption is that the vessel was seaworthy. The fact of her seaworthiness in her hull and stowage is sustained by the proofs. We shall return to this branch of the subject under the next head. We assume for the purposes of this branch of the argument that the shipowner was, as regards seaworthiness of his vessel, in a position to invoke the exemption given by the act, if the cause of loss was one which falls within its terms.

The libellant below insisted and the court (as would appear) decided that the loss of cargo incurred after the deviation from the intended rounding of the Cape, though due to the perils then encountered, would have been avoided, if the ship had turned back and sought refuge and repairs in the Falkland Islands. Her failure to do this, it was held, was a failure of duty in the “custody, care or proper delivery” of the cargo, as defined in Sect.

2 of the Act, and made the ship responsible. The ship-owner contended that if the master was guilty of fault at all, that fault was committed in the "management of the ship," not in the "custody, care, or proper delivery, of the cargo," and that the ship was exempted from liability by Sect. 3, which has been already quoted. The libellant offered the case *Knott v. Botany Mills*, 179 U. S. 69, as conclusive, but we submit that that case simply decided that the stowage of sugar in such a place that it would drain liquid upon wool stowed next to it, was primarily *bad stowage*, even though the wetting of the wool was caused by a change in the ship's trim brought about by the stowage. This change of trim was not "management of the ship," but a mere incidental result of stowage in a particular way. Judge Brown of the District Court, whose opinion (76 *F. R.* 584) was quoted from by the Supreme Court admitted, however, that if the change of the ship's trim had been done designedly "and primarily with reference to the ship, and for the benefit of the ship, or with a view to her sea going qualities," then the change of trim would have been an act in the "management of the ship." The case, certainly, does not support the view of the court below in the case at bar. Now, in the case of the "Musselcrag," the cargo was originally properly stowed and its wet condition, after the ship had encountered the heavy weather of the voyage, was not known to the master. At Sydney, it seemed to be in good order, except for stains (*Tr.* p. 157). But if this had been known to him, the fact would still remain that the fault, if there was fault

committed in not seeking a port of refuge, was one *in the navigation or management of the ship*. It is the very essence of the statute and the prerequisite of its application, that its exemption shall cover the consequences of the management or navigation of the ship *upon the cargo*. Loss or damage which follows upon such mismanagement does not refer to loss or damage to the ship herself.

“The whole object of the Act is to modify the relations previously existing between *the vessel and her cargo*.”

The Delaware, 161 U. S. 471.

Nor does the Act refer to the management of the ship as regards other ships. Liability arising from collision with another vessel, it has been expressly held, is not intended to be covered by the Act (*The Delaware*, 161 U. S. 470), yet *loss of cargo* carried by the vessel in fault, though caused by negligence, is covered by the very terms of the Act and does not create a liability.

The Viola, 59 F. R. 632.

It is clear, then, that the management or navigation of the ship, referred to in the Act, must be with reference to its effect upon the cargo only, and that its provisions cannot become operative, unless cargo be lost, or in some way affected by failure to properly manage the ship. “Custody” and “care” of cargo, it is true, are, in a sense, wanting, if a ship be negligently run upon a rock, or into collision, resulting in damage to cargo, yet it is conceded that, under the Act, the ship

is not responsible for such loss. Within the object and meaning of the law, such losses cannot be due to fault in "custody" or "care" of cargo, but only to fault in the management of the ship. When the mind contemplates the fact that ship and cargo become a single thing on a voyage that management of the ship very often affects care of the cargo, and that custody and care and stowage of the cargo as often affect the navigation or management of the ship, and that the Act intends to *abrogate* the rule of the common law, so far as the latter creates liability for loss of cargo caused by fault in navigation or management of the ship and, on the other hand, to *maintain and emphasize* the liability created by the common law for a loss caused by the ship's default in properly guarding or caring for the cargo, it seems difficult to reconcile the provisions of the law and to avoid the conclusion that they practically nullify one another. Careful consideration, however, shows that there is no inconsistency, and that a rule can be laid down, which will enable courts to determine, with certainty, the rights of parties. That rule is that where an act is done, the *primary object* of which is the navigation or management of the ship, such act, though faulty or negligent, and though it involve, in its results, the cargo, creates no liability. On the other hand, if the act primarily is done in the custody or care or delivery of the cargo, and the act be negligent, a liability exists, notwithstanding the fact that, broadly speaking, it must be conceded that such act was bad management of the ship.

In *The Sylvia* 171 U. S. 462, it appeared that the master of a ship had failed, on leaving port, to close the iron shutters of a port hole. The glass door was closed. When the ship started, the weather was fair. The hatches were battened down, but it was easy to remove them and there was no cargo near by to prevent access to the port hole. In the afternoon, rough weather came on, which broke in the glass shutter and flooded the compartment, thus damaging certain merchandise. The court held that the failure of the ship to close the iron shutters before departure did not make the ship initially unseaworthy. It did not hold that the omission to close the shutter when rough weather came on was a fault in "custody or care of the cargo," though, in ultimate effect, it undoubtedly was such, but held that the closing of the shutter was primarily a matter affecting the management of the ship, and that the failure to perform that duty was *a fault or error in its navigation or management*, for the consequences of which neither ship nor owner was responsible by reason of the exemptions of the Harter Act. The court said (p. 466):

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel, within the meaning of the Act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry the cargo. But they do include, at the least, *the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas*; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or

management of the ship. This view accords with the result of the English decisions upon the meaning of those words.”

In the case at bar, the failure to take the ship into a port of refuge presents no nice question of the use, or failure of the use of appliances on board. The act done was clearly in the management of the ship, as a whole. It was an act in “navigation and management,” within the very words of the exemption of the Act. The English cases which are approved by our Supreme Court are even more decisive.

In *Dobell v. Steamship Rossmore*, 2 Q. B. (1895) 417, *Lord Justice Kay*, in a case in which the question was, whether a port hole which has been left insufficiently fastened when the voyage began and with cargo stowed up against it, so that it could not be reached without great delay, constituted unseaworthiness, or was a fault in navigation or management, said:

“I incline to think, contrasting the various clauses of the bill of lading that the expression ‘faults or errors’ in navigation or in the management of said ‘vessel’ applies rather to faults or errors in sailing the vessel, or in managing the sailing of the vessel.”

Lord Justice Smith, referring to Section 3 of the Act, says:

“I may say, however, that the meaning of the section is that, if the shipowner by himself or his agents uses due diligence to make the ship seaworthy when she starts, he shall not be liable for what hap-

pens afterwards when the ship is at sea and he has no more control over her.”

In *Canada Co. v. British Owners Assn.* 23 Q. B. Div. 344, Lord Justice Bowen said:

“Navigation must mean something having to do with the sailing of the ship; that is, of course, the sailing of the ship having regard to the fact that she is a cargo carrying ship.”

In *Carmichael v. Liverpool etc. Assn.* 19 Q. B. Div. 247, Lord Esher, Master of the Rolls, said:

“The question must be: what is the interpretation to be put on the words ‘caused by improper navigation.’ It seems to me that they do not refer simply to improper navigation with regard to the ship herself, *but also to improper navigation with regard to the safety of the goods of the ship.*”

Fry, L. J. said:

“We have to construe the words ‘improper navigation of the ship,’ with reference to the loss or damage of or to any goods or merchandise carried by the ship.”

Lopes, L. J. said:

“The important words are ‘improper navigation’ and the court has to determine what is the meaning of improper navigation. In my opinion, improper navigation means the improper management of a ship *in respect of her cargo * * * during the voyage.*”

In the case at bar, what may we suppose to have been the thought uppermost in the master’s mind, when

after *seven weeks* he found that there was, seemingly, no end to the fierceness of the gales, that his sails and ship's gear had been tried to their utmost, that his crew were battered, wounded and exhausted, that his ship was deeper in the water than she should be? Was the thought one which was in the nature of an inquiry as to *how he should dry out the top tiers of cement* which he may have had reason to think, or which he may have known had been wet by sea water, or was it one which asked of his judgment and experience: *What is the best way of getting my ship out of this trouble, so that my voyage may be performed?* Shall I still seek to make the passage round Cape Horn, or shall I seek the easier voyage round the Cape of Good Hope, or shall I seek shelter at some port?

In any one of these cases, his decision must have been as to how he should navigate or manage his ship. In none of them, would he have acted *primarily*, with reference to the care, or custody of the cargo. The care and custody of the cargo were purely incidental. "What course shall I steer, in view of the perils surrounding me?" was the question which was answered by the order to bear to the eastward. If the master's judgment was erroneous, the error lay in the mistake which he made in choosing one, instead of another of the courses offered. His duty was to get his ship and cargo to their destination. In the performance of this duty, he is said to have made a mistake, *by taking his ship in one way, instead of in another*. The error was clearly

Master's performance, or non-performance of duty in repairing at port of distress is "management of ship" ----
Judge Brown in The Guadalupe, 92 F.R.670.
A fortiori, proceeding to or failing to proceed to such port is "management of the ship".

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fortiori, proceeding to or failing to
Judge Brown in The Guadalupe, 22 F.R. 670.
--- "management of ship".
cess of duty in repairing at port of dis-
Master's performance, or non-perform-

an error of navigation and management, although there was cargo on board which, perhaps, would have been saved from greater damage, if he had followed one course rather than another. But possible, or probable, or certain injury to cargo, in such case does not change the character of the fault. The master acted as he did in managing his ship and we have seen that there is no fault of navigation, or management of the ship conceivable under the Harter Act, which does not affect the custody and care of the cargo in greater or less degree. *The cargo must be damaged by such fault* in order that a case may be presented of common law liability in which the Act may interpose to save the ship-owner, who is the beneficiary intended by its exemptions.

*

In *The Glenochil* (1896) Prob. 10, one of the cases cited as authority by the Supreme Court in *The Sylvia*, Sir F. H. Jeune says, speaking of the Harter Act (p. 14):

“No doubt the object of S. 1 is in terms to prevent clauses being inserted in mercantile instruments which would exempt the carrier from want of proper care in regard to the cargo. It is obvious that those words cannot be taken in their largest sense, because in a secondary, though not primary sense, *any mismanagement of the ship, in navigation or otherwise*, is want of proper care as regards the cargo. But it is clear that it was intended by S. 3 to exempt from liability for loss or damage resulting from faults or errors of navigation, or in the management of the vessel; and the way in which those two provisions may be reconciled is, I think, first

that the act prevents exemptions in the case of *direct want of care in respect of the cargo*, and secondly, the exemption permitted is in respect of a fault *primarily connected with the navigation or the management of the vessel*, and not with the cargo."

The case quoted from is in its facts an extreme case. The ship had performed her voyage and having been partly discharged, required stiffening. Water was accordingly pumped into one of her ballast tanks. Owing to inattention, it was not known that the sounding pipe and casing had become broken on the voyage. The water leaked through these upon the cargo and damaged it. It was held by the court that the fault was in the management of the ship, within the meaning of those words in the Harter Act.

The Circuit Court of Appeals of the Second Circuit analyzed the Act of Congress in the same way, but from the point of view of the cargo owner, when, in *The Germanic*, 124 F. R. 1, it approved the following language:

"The fact that an act primarily having to do with cargo must incidentally affect the ship, does not bring it within the class of acts done in the management of the ship. If the particular manner of performance adopted is not adopted with a view to its effect upon the ship, but does affect the ship in a way that causes damage to the cargo, the ship is not exempted from liability. * * * The controlling fact is that the effect on the ship is produced without intention and by accident. The negligence is in the manner of performing the act intended, to-wit, the act having to do with the cargo. It is not in the management of the ship, because no act intended to affect the welfare of the ship is being performed."

In this case, the ship, after arrival, sank at her wharf, because of "the hurried and improvident removal of her cargo." She became topheavy, lurched over so that she took in water through an open coal port and sank, destroying what cargo had not been removed. The fault was in the stevedores. The court held that this careless removal of cargo by the owner's shore agents had no relation to the management of the ship, but was a fault in unloading or delivery of cargo. The effect upon the ship, though unmistakable and seemingly very direct, was purely consequential upon an act done primarily with reference to the cargo, not the ship.

"It was not undertaken with the intent to benefit, influence or change her in the remotest particular. It dealt with the cargo as distinguished from the ship" (p. 6).

The Glenochil and *The Germanic* aptly illustrate the argument which we make.

In *The Merida*, 107 F. R. 146, it was held that failure to pump out the ship's bilges during the voyage, by reason whereof the cargo was damaged, was a fault *in the management of the ship*. It is quite clear that the same rule must govern, whether *the ship is so managed* that water goes through her decks, or that after it gets into the ship, it is not pumped out. The intention of the Act clearly is that the owner shall be required to furnish a good ship and that his servants shall properly stow the cargo. Thereafter, while the ship and her management still remain beyond his reach he is exempted from liability for damage to cargo, caused by his servants' acts,

until the destination shall be reached and the ship shall be again under his control for delivery of the cargo.

We submit that the act complained of by the libellants below is not one for which the law gives any right of action.

III.

THE APPEAL OF THE CARGO OWNER THAT THE SHIP WAS NOT SEAWORTHY FOR THE VOYAGE IS NOT SUSTAINED BY THE EVIDENCE. THE LOSS WHICH FELL UPON THE CARGO WAS DUE TO SEA PERILS ONLY.

It is recognized as the law that, with reference to the contract of carriage, as well as to the contract of insurance, the presumption of law is that a ship is seaworthy for her voyage. The burthen of proof to the contrary is on him who asserts the unseaworthiness. The Supreme Court has said:

“By the third section of that Act (Harter Act) the owner of a seaworthy vessel (and, in the absence of proof to the contrary, a vessel will be presumed to be seaworthy) is no longer responsible to the cargo for damage or loss resulting from faults or errors in navigation or management.”

The Chattahoochee, 173 U. S. 550;

The Wildcroft (C. C. A.) 130 F. R. 521, 527.

The ship's contract is one of insurance against all perils not excepted by the bill of lading. The burthen of proof is upon her, therefore, to prove that the loss occurred by reason of such perils. Proof that on the voyage she encountered such perils and that they were

sufficient to account for injury to a seaworthy vessel, coupled with the presumption above stated, exonerates her, unless it be shown by him who asserts the fact, that the vessel was not seaworthy for the voyage. And if it be shown that, in a particular respect, it might be surmised that a vessel was not as strong, or as perfect as she might have been made, it is a sufficient answer, if seaworthiness be shown by general evidence. Such evidence, in connection with the proved sea perils is enough to exonerate the ship, in the absence of satisfactory countervailing evidence of a positive defect existing at the time of sailing.

“Where it satisfactorily appears that the vessel encountered marine perils which might well disable a staunch and well-manned ship, no such presumption (unseaworthiness) can be invoked. And where for a considerable time, she has encountered such perils and shown herself staunch and strong, any such presumption is not only overthrown, but the fact of her previous seaworthiness is persuasively indicated.”

Warren v. Adams (C. C. A.) 74 F. R. 455 and cases cited.

The Supreme Court denied a motion that *certiorari* issue to review this case, 163 U. S. 679.

In the case quoted from, the damage to the cargo arose from leaks caused by the coming out of the oakum in the seams of a vessel's centreboard. It was shown that prior to departure, a carpenter had looked the vessel over, including the centreboard, and tried some of the seams. Sea perils having been shown, the court

declined to condemn the vessel simply because the carpenter had not tried *all* the seams of the centreboard.

“It is reasonable to assume,” it said, “that those he did examine were in such condition as to justify an experienced man in believing that a more critical examination was not necessary.”

In the same court, the same question again came up in a later case. Water came into a steamship through a rivet hole during most tempestuous weather. Unseaworthiness was charged owing to the defective rivet, the head of which had come off. The fact of the defectiveness was admitted, but it was of a nature which would not have required that it should be pronounced to be unfit to stand the test of the contemplated voyage. The court said:

“There was no leakage during the first two weeks of the voyage. The sluices were opened February 14th and no water was found. *Owing to the continually heavy weather that followed*, they were not again opened until March 6th, and it was during the intervening time that the rivet became loosened. The excessive strain to which it was subjected during the exceptionally heavy weather of this period of 20 days in which it broke, adequately explains the cause of the mishap.”

The Sandfield, 92 F. R. 664.

“The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.”

The Sylvia, 171 U. S. 464.

Capt. Johnston, of the “Musselcrag,” a master of 20 years’ experience, joined the ship immediately prior to

the voyage in question. The ship was four years old. He examined her and found her in good order. She was then in dock. She was thoroughly cleaned and overhauled and painted inside and out (*Johnston*, pp. 52, 53). The master explains that the vessel was beamy and naturally stiff, but not unusually so (*Johnston*, p. 54). To avoid having the ship too stiff, apparently under the owner's instructions (*Johnston*, p. 54), the cargo was so stowed as to throw as much weight as reasonably was possible into the upper part of the hold and the between decks. In stowing the cement, the ends of the ship were left empty, as air spaces to give buoyancy; the cargo was "raised" by the laying of inch boards on the barrels, beginning with the sixth tier, and carrying this division between tiers on upwards. The unfilled space, except as filled by the boards, amounted to the height of one tier and there was still room, not used, between the stowage and the between deck beams for another tier. More than the usual allowance was thus made for the natural stiffness of a beamy ship. The custom at Antwerp was to begin "raising" with the eighth tier from the bottom. In this case, "raising", as we have seen, was begun with the sixth tier. When full, the "Musselcrag" was loaded with 2350 tons in the lower hold and 928 tons in the between decks. Thus loaded, she was down to her marks as she lay in the river. On reaching salt water, she would rise six inches and become still more buoyant. In the judgment of the master, she was well

The depositions of Abt and Hazen confirm the character of the stowage (Tr. p. 75). They were the stevedores, chosen by the charterers under the privilege demanded by them in the charter party (*Johnston*, p. 73). The carpenter (*Milne*, p. 22) also confirms the character of the stowage. The ship's decks had been caulked before starting on the voyage from the South American coast to Liverpool and were in good order. The ship's carpenter carefully overhauled them and tested them at Antwerp (*Milne*, p. 23). The caulking was done in October, November and December and should last two years (*Milne*, pp. 33, 34). The ship sailed from Liverpool in July of the next year (*Johnston*, p. 55). The caulking, therefore, was six months old. The sail equipment of the ship was perfect (*Lawson*, sailmaker, p. 34). The ship carried 35 tons more of cargo on her onward voyage from San Francisco (*Johnston*, pp. 52, 55) than was in her on this voyage.

After the vessel sailed from Antwerp nothing of material importance happened until she reached the River Platte. The log shows that there was a slight weeping of seams in the forehold after the ship had got to the region of Cape Horn, "a drop now and again " from the seam * * * a very common occurrence". These were put into good condition (*Milne*, carpenter, pp. 23, 24). Slight leaking was found the 29th of September, after some heavy weather had been experienced. The decks were not weeping to any great extent (*Captain Johnston*, p. 59; *Milne*, p. 32).

“It is a general occurrence with a good many vessels that some of the seams weep a little, after you get through the very hot weather of the tropics” (*Milne*, p. 32).

The ship's record down to the time when she struck frightful weather off the Horn is evidence that she was seaworthy in stowage and hull and equipment when she sailed. Her survival of the gales encountered without loss of her spars, proves that the danger did not come from the method of her stowage. It is claimed that the ship rolled and strained, so that her decks opened and that she suffered other injuries, and that these were all primarily due to bad stowage, viz: the excess of weight in the ship's lower hold beyond what it should have been, but it is well known that excessive rolling is very often the result of a ship's build and is inevitable, though the ship be entirely seaworthy. One of the most modern and magnificent of the Atlantic liners, “Kaiser Wilhelm” was generally known among tourists as “Rolling Billy”. She became so unpopular that her name had to be changed. She was dubbed “Hohenzollern” and a new ship which did not roll so much was given the old name. If there be one thing that the architects of such a vessel sought to secure in designing her, it was to make a comfortable steady vessel. There is no evidence that rolling did any damage to the “Musselcrag”.

“The ship had behaved well up to the time we reached the Horn. She had given no evidence of being too stiff or too cranky” (*Capt. Johnston*, p. 56).

“The ship rolled heavily in the strong breezes of wind, but nothing particularly *with the cargo she had in. Cement is a very bad cargo for a vessel to roll with.* The cargo was high enough up in the ship” (*Milne*, pp. 28, 29).

“Coming to the Horn, the ship behaved very fair, pretty good. She was all right until we got down there. She did not roll or strain a great lot; she was all right, like any ordinary ship” (*Faraday, second mate*, pp. 42, 44).

“The rolling of a ship in heavy weather is *a sea peril*” (*The Manitoba*, 104 F. R. 145, 153, by Judge Brown).

In opposition to the foregoing evidence of men who saw the ship stowed and did the stowing either actually or by superintendence, including the stevedore selected by the libellants' agents, and of those who tested the stowage by actual experience on the voyage, we have the evidence of the San Francisco stevedores and two British shipmasters. Three of these witnesses testify that in their opinion the ship was too stiff; that she had too much cargo in the lower hold, as compared with the between decks, and that she would roll and strain more under such circumstances than if she had 100 tons less weight below. These facts do not prove unseaworthiness, if they be conceded. It was admitted by one of these masters that the stevedore who loads the ship and her master are the best judges of how a vessel should be stowed (*Steele*, 124). When the evidence of these masters is read in the light of the facts, when their readiness to swear that the weather shown by the log was *mere ordinary Cape Horn weather* is made to

appear, there is no question that they came to court not as experts, but as advocates for the cargo owner. A new ship starting on her maiden voyage, or an old ship starting from a foreign port under a new master, must be stowed on judgment to some slight extent. Experience only will tell whether she be a little stiff, or cranky, and this experience is utilized at the first opportunity by the master, upon whom, if a slight change be desirable, devolves the duty of re-stowing a part of his cargo, so as to offset either the crankiness, or stiffness. A similar duty falls upon him when his cargo is found to have shifted dangerously. The necessity imposes upon him the taking of required action as a duty in navigating his ship. The master of the "Musselerag" did this very thing when he found that the effect of the gales which caused a wetting of cargo, was lessening his ship's buoyancy. The necessity of re-stowing, if it was found to exist after leaving port upon meeting heavy weather, but was not known to exist when he did leave port, or for weeks thereafter, does not prove that the ship left in an unseaworthy state.

"A ship may be seaworthy when she sails, although she could not safely perform the voyage *in the precise state in which she sailed*. Hatches may be off in the ordinary course, or a porthole may be open, but in such a position that it can be, and will in ordinary course be closed after sailing. Those are not cases of unseaworthiness."

Carver, Carriage by Sea, Sec. 18.

If it be true that the ship was a little too stiff to meet a very heavy sea with the best advantage, and that re-stowage was necessary, that would not be a case “ of initial unseaworthiness, but of neglect or default in “ the prosecution of the voyage”, if the master should have rectified the matter and failed to do so.

The words quoted are those of Lord Herschell, referring to a porthole left open on starting, which could be closed later on.

Gilroy v. Price (1893), A. C. 64;

Hedley v. Pinkney (1892), 1. Q. B.;

Steel v. State Line, 3 A. C. 72.

Two of the cases cited came up for discussion under the clauses permitted by English, but not by our law, exempting the shipowner from the consequences of the neglect of the master on the voyage. The question was whether the loss, which was caused by an omission to close a pipe in one case and a porthole in the other, each left open when the ship sailed, was due to a ship “initially unseaworthy”, or to negligence in carrying on the voyage. The same point came up before our Supreme Court in a case already quoted from. A steamer leaving port in fair weather had closed only the glass door of a compartment porthole. The iron door, necessary in rough weather, was not closed. *The hatches had been battened down*, but these could easily be taken up, and as no cargo had been stowed against the porthole, the latter could be reached in case bad weather should come on. The court held that the ship

did not start unseaworthy and that the injury to cargo was due to the fault of the master in failing to close the iron shutters when this was required, and that under Section 3 of the Harter Act, the owner was not liable for this fault, because it was one which occurred in the navigation or management of the ship.

The Sylvia, 171 U. S. 465;

In *The Irriwaddy*, 171 U. S. 193, the Supreme Court took occasion to say that the Harter Act was enacted to place American shipowners on an equality with English shipowners in regard to the risk of the shipowning business; in other words, to give to them the exemption against the negligence of the master or crew which the authorized terms of the English bill of lading gave to the English shipowners, but it was provided by the Act that such shipowners must, initially, have used due diligence in making their ships seaworthy.

The regulation of the trim of the ship is a part of the management of the ship and hence within the Harter Act, where such regulation is done, or should be done primarily with reference to the ship and for the benefit of the ship.

Botany Mills v. Knott, 76 F. R. 584.

If, then, the ship started seaworthy as to stowage, the fact, if true, that she afterwards required to have her trim changed to meet different conditions, imposed a duty on the master, *in the management of his ship*, to make such changes as might seem to be necessary. If

he failed in this regard, though the cargo suffered, the owner is not liable. The stiffness thus produced affected the ship directly. It affected the cargo only as a consequence of the effect on the ship. In view of the evidence, however, the point is hardly one under discussion. The access of water to the cargo when the heavy gales came on, the absorption of water by the cement, thus giving the pumps no chance, (*Johnston*, p. 60) did make the ship too deep and compelled the master to move some lighter stuff from the hold to the between decks and to jettison 400 to 450 barrels of cement (*Johnston*, p. 66; *Faraday*, p. 45). This sacrifice eased the ship, which was suffering the most severe kind of weather and carrying a saturated cargo; yet these barrels, giving them two hundred pounds apiece, did not weigh more than 40 or 45 tons. How, then, shall it be said that this ship started *two months* before that time so deeply or so badly laden, that she must be held to have been unseaworthy at that time? As we have seen, she carried a still heavier cargo on her outward trip.

THE DAMAGE DONE WAS CAUSED BY SEA PERILS.

We shall not attempt to argue this proposition. The evidence is clear that the weather encountered was of unexampled ferocity. The witness, Capt. Quayle, called by libellant, had some strange motive swaying him when he declared that he had read the log and that it disclosed only ordinary Cape Horn weather.

“Whether decks be new or old, the pitching and twisting and pounding of the vessel in such weather will be likely to cause a leakage. Such a result cannot, therefore, under such circumstances be accounted evidence of unseaworthiness, *even when the tempestuous weather is anticipated at starting.* It is not clear, however, that any damage was sustained from leakage until after the hurricane or cyclone was encountered beyond Point de Calle. The weather through which the vessel then passed is amply sufficient to account for the crippled condition in which she reached Bombay, *without the aid of any inference of unseaworthiness at starting.* But for this storm, I find nothing to justify belief that she would not have continued her course and reached Aden safely, with little or no loss to cargo. In that case, the question of seaworthiness could not have arisen, and what is now said of her decks, overloading, insufficiency of fuel, would not have been thought of. It is inspired by the desire to find some other cause of disaster than the storm—a sufficient, the most obvious cause—and thus to charge the vessel with loss, which otherwise the libellant must bear.”

The Marlborough, 47 F. R. 670.

This court may say, with the Court of Appeals in *American Sugar Co. v. Rickinson & Co.*, in 124 F. R. 188, 192, where experts were called to overthrow uncontradicted direct evidence:

“Having found a perfectly plain and adequate cause for the damage we are not required to resort to speculation and guess work to find an additional cause,”

or, in view of the strenuous efforts of libellants' experts on weather to show that extraordinary gales mean merely

ordinary weather, it may say, with Sir Robert Phillimore :

“I am unable to draw the distinction forced upon me between *ordinary* and *extraordinary* perils. In truth, it may be said that the way in which the cargo was stowed was, more or less, a cause of the damage; but I am of opinion that the evidence shows that the cargo was stowed in the ordinary way and if the bad weather had not occurred, and the straining had not taken place, the cargo would, I think, have arrived without damage, and consequently *the proximate cause of the damage must be taken to have been the perils of the sea.*”

The Catharine Chalmers, 2 Asp. Mar. Cas. N. S. 599.

The charter party provides that the libellants' appointee at the port of loading shall act as stevedore in loading the ship, but at ship's expense and under the master's direction (Tr., pp. 73, 130). Although we do not, under this clause, question the ship's responsibility for stowage affecting her seaworthiness, if such there was, still the legal effect of the clause is to make the stevedore, in the general sense, the *charterer's* servant.

The Catharine Chalmers, 2 Asp. Mar. Cas. 598;

Harris v. Best, 7 Asp. Mar. Cas. 274;

Blaikie v. Stenbridge, 6 C. B. N. S. 894;

Guerard v. The Lovspring, 42 F. R. 856.

The charter party does not say that such stevedore as the charterer may select shall be *employed by the ship*. The cases cited show that the privilege of appointment of the stevedore stipulated for by the charterer carries

with it the burthen usually borne by an employer as to all stowage not affecting seaworthiness. Our reference to this matter, however, is simply to call to the attention of the court the fact that the ship was loaded by experienced stevedores employed by the libellants *for their own protection*, and that the master, an experienced officer, supervised the work on behalf of the ship. Both had one and the same duty to perform on behalf of their respective principals. Both have testified that their duty was properly performed, the stevedores having been examined on behalf of the libellants, the master on behalf of the respondent. They knew what they did and upon them was the responsibility of properly doing that for which they were paid. The libellants now seek to show by a couple of San Francisco stevedores and two roving shipmasters that the ship was badly laden *by the stevedores of their own selection*.

We respectfully submit that the fact of the unanimity of the stevedores and master in declaring the stowage good, the presumption that they did their duty and that the stowage, therefore, was good and the overwhelming proof of extraordinarily violent weather on the voyage, amply sufficient to account for the damage done, must overcome the opinions of the San Francisco witnesses which betray an eagerness to testify approaching partiality and which, at best, are arguments after the event. Surely such evidence as the libellants adduce does not sustain the burthen of proof cast upon them by the respondent's case.

We have caused to be printed, as part of this brief, such portions of the log book as show the nature of the weather through which the ship went.

In conclusion, we submit that, as regards the defense of sea perils, we have fully sustained the burthen cast by the law upon the ship and that the libellants have failed to maintain their charge of bad stowage creating unseaworthiness. We have, also, shown that, at the maritime law, no blame can be charged against the master for the honest exercise of his judgment in deviating as he did, and that, if culpability has been shown, the error was committed in the "navigation or management of the ship," not in the "care or custody of the cargo".

We ask that the decree below be reversed and the libel dismissed.

Respectfully,

PAGE, McCUTCHEN & KNIGHT,

Proctors for Appellants.

APPENDIX.

EXTRACTS FROM LOG OF BRITISH BARK "MUSSELCRAG".

- Sept 11, 4 A. M. Fresh breezes; shipping quantities of
 " " water amidships.
- " 11, P. M. Fresh breezes; head sea; shipping
 " " quantities of water amidships; under top-
 " " gallant sails.
- " 14, A. M. Heavy jump of head sea.
- " 15, P. M. Fresh breezes; head sea; shipping
 " " water at times.
- " 16, P. M. Head sea making. A. M. Shipping
 " " water forward and amidships.
- " 17, P. M. Fresh breezes, with head sea; midnight,
 " " still heavy sea, with S. W. squalls; 8 A. M.,
 " " stowed mainsail, with violent rolling.
- " 18, P. M. Ship rolling heavy; 5:30 A. M., weather
 " " more mild; carpenter caulking main deck.
- " 24, 4 A. M. Heavy head sea; ship plunging; ship-
 " " ping water amidships.
- " 25, P. M. Rolling and pitching heavily under top-
 " " sails and full mainsail; 6:30, heavy sea from
 " " westward.
- " 26, P. M. Plunging into head sea.
- " 27, A. M. Hard squalls and heavy Westerly swell.
- " 28, P. M. Fresh gale, with high sea; shipping
 " " water amidships.
- " 29, P. M. Shipping heavy water; ship straining
 " " badly; heavy lurches.
- " " A. M. Find seams in foredeck leaking; put on
 " " tar and oil, through straining.

- “ 30, P. M. Ship rolling and straining; rolling
 “ “ heavy and shipping water. 5 A. M. Ship
 “ “ plunging heavy; 8 A. M., hard squalls, ship-
 “ “ ping large bodies of water between the
 “ “ squalls; 11 A. M., hard gale, still laboring and
 “ “ straining heavy; Williams, A. B., and appren-
 “ “ tice on the sick list; Barometer, 29.20.
- Oct. 1st, P. M. Ship laboring and straining and ship-
 “ “ ping large bodies of water all over; sea
 “ “ making; 8 to 10 P. M., decks continually
 “ “ flooded all over; 2 A. M., terrific squalls and
 “ “ increasing; 6 A. M., all hands stowed fore
 “ “ topsail and foresail; wind blowing with hurri-
 “ “ cane force; a continual drift fore and aft;
 “ “ shipping large bodies of sea water; decks
 “ “ continually full; weather too bad to sound
 “ “ pumps; watch chance to get fore and aft.
 “ “ Bar. 28.80.
- Oct. 2nd, P. M. Still continuous hard gale, decks con-
 “ “ tinually flooded, shipping large bodies of
 “ “ water fore and aft; A. M. Terrific squalls,
 “ “ sleet and snow; Williams and apprentice on
 “ “ sick list.
- Oct. 3rd, P. M. Gale from N. W. still continues, ship
 “ “ laboring heavy, high sea from the Westward,
 “ “ shipping large bodies of water; 8 o'clock, ter-
 “ “ rific squalls. Barometer, 28.50.
- Oct. 4th, P. M. Ship rolling heavy and straining, ship-
 “ “ ping large quantities of water; 7 o'clock, in
 “ “ jibing, the spanker boom broke, doing con-

- “ “ siderable damage. 2 A. M. Gale started
 “ “ afresh; tremendous sea; 8:30, the starboard
 “ “ fore topsail sheet broke and sail split, all
 “ “ hands stowed the sail; using oil from the star-
 “ “ board forward and after closets, in all about 4
 “ “ gallons; Bar. 28.40.
- Oct. 5th, 11 P. M. Gale again increasing, shortening
 “ “ sail; dangerous to get fore and aft; tremend-
 “ “ ous bodies of water falling and breaking on
 “ “ board; upper main topsail down-haul carried
 “ “ away through the heavy lurching; lashed the
 “ “ two yards together; short of fresh water, can
 “ “ not get to fresh water tank. Bar. 28.50.
- Oct. 6th, P. M. Ship laboring and straining badly,
 “ “ shipping large bodies of water, galley and
 “ “ deck houses continually flooded. 2 A. M. Gale
 “ “ again increases with terrific force, ship labor-
 “ “ ing and straining, decks continually full of
 “ “ water; no chance to serve out fresh water yet;
 “ “ 2nd mate, Williams, and apprentice on sick
 “ “ list. Bar. 28.60.
- Oct. 7th, P. M. Gale still blows with same violence and
 “ “ ship struggling to keep decks free from water;
 “ “ 2nd mate and apprentice laid up sick.
- Oct. 8th, 2nd mate, Williams, and boatswain on the
 “ “ sick list.
- Oct. 9th, 2nd mate, boatswain, and Williams still on
 “ “ sick list; find that a considerable quantity of
 “ “ sea water had gone down fore hold through
 “ “ the decks.

- Oct. 11th, 4 P. M. Breeze increasing rather quickly;
 “ “ continuous seas breaking on board and flood-
 “ “ ing the decks fore and aft; 11 P. M., sea
 “ “ broke on the quarter deck and smashed the
 “ “ chicken coop to leeward. 2 A. M. Rolling
 “ “ terrific, decks full of water, ship straining
 “ “ badly, wind going down and leaving the sea;
 “ “ carpenter looking over cargo fore and aft; 2nd
 “ “ mate, boatswain, and Williams, A. B., sick.
- Oct. 12, A. M. Hands employed shifting cargo fur-
 “ “ ther aft and higher to ease the ship; 2nd mate
 “ “ and Williams still sick.
- Oct. 13, P. M. Fresh gale, with increasing squalls;
 “ “ 1:30 the lee of the outer jib stay carried
 “ “ away—secured the sail and stay; 2:30, the
 “ “ inner jib stay carried away—all hands secured
 “ “ the sail and stay, and took in upper topsails;
 “ “ squalls blowing with terrific violence; 10:00,
 “ “ ship rolling terrible and filling the decks fore
 “ “ and aft; 2nd mate and Williams sick.
- Oct. 14, Midnht. Hard gale, which continues; ship
 “ “ laboring and straining and shipping large
 “ “ bodies of water all over. A. M. Still con-
 “ “ tinues hard gale, increasing to high gales at
 “ “ noon; 2nd mate and Williams sick.
- Oct. 15, P. M. Gale increasing, bad threatening ap-
 “ “ pearance; 2 P. M., terrific squalls, the lee main
 “ “ topsail sheet carried away; while securing the
 “ “ main, the foretopsail went to pieces at once;
 “ “ the lee main lift also carried away; later the

- “ “ mizzen staysail went to pieces; ship now
 “ “ under bare poles, tremendous sea running,
 “ “ using oil from lee closets—about 10 gallons.
 “ “ Midnight. No abatement; ship struggling to
 “ “ free herself of weight of water on deck; port
 “ “ maintopmast backstay gone. 2 A. M. Terrific
 “ “ sea broke on the ship at fore rigging, taking the
 “ “ two boats with all gear attached from forward
 “ “ skids; the gale broke again with hurricane
 “ “ force, with a clean drift; 8 A. M., still con-
 “ “ tinues; port forecastle door stove, also the
 “ “ galley door; places flooded; 2nd mate and
 “ “ Williams sick.
- Oct. 16, P. M. High gale still continues without
 “ “ taking off; decks still flooded, and ship strain-
 “ “ ing badly. Midnight. Wind taking off, but
 “ “ a tremendous sea running; decks full of
 “ “ water and people generally being knocked
 “ “ down. Noon. Find the starboard bulwarks
 “ “ started inward from fore house to main
 “ “ hatch; seams along the main deck open bad.
- Oct. 17, 6:30 P. M. The gale again started, by 8
 “ “ o'clock blowing with hurricane force, and con-
 “ “ tinuing until 4 o'clock A. M.; tremendous sea
 “ “ running; no fresh water served out to-day—
 “ “ no chance.
- Oct. 18, P. M. Gale from W. S. W. and heavy sea
 “ “ running, shipping large bodies of water, con-
 “ “ tinuing until midnight; 2nd mate and Will-
 “ “ iams, A. B., sick. Bar. 29.50.

- Oct. 19, P. M. Fresh gale, heavy head sea; A. M.
 “ “ No sun to-day; this is just miserable, the ship
 “ “ tumbling about between the squalls with the
 “ “ decks full of water most of the time; Williams
 “ “ still sick. Bar. 29.50.
- Oct. 20. P. M. Fresh gale and squalls of sleet and
 “ “ snow. Noon. Heavy gale struck the ship; all
 “ “ hands out; 2nd mate and Williams still sick.
 “ “ Bar. 29., falling.
- Oct. 21, P. M. Commences with living gale from N.
 “ “ W.; all hands out; 3 P. M., the mizzen staysail
 “ “ blew to pieces in a terrific squall; sea running
 “ “ high and choppy, shipping large bodies of
 “ “ water; no water served out; 8 P. M., still
 “ “ blowing with increased fury; ship laboring
 “ “ and straining; watch below standing by
 “ “ handy; Midnight, the same; 4 A. M., found
 “ “ ventilator cover on forward house unshipped
 “ “ broken; recovered the same with canvas; sea
 “ “ water going down; 2nd mate and Williams,
 “ “ A. B., still sick, Apprentice Rogers also; Bar.
 “ “ 28.50.
- Oct. 22, P. M. High gale still continues from S. W.;
 “ “ 8 P. M., gale again increases with violence;
 “ “ 2nd mate and Williams, A. B., sick. Bar.
 “ “ 28.80.
- Oct. 23, P. M. Moderate gale from S. W.; heavy
 “ “ Westerly swell; ship rolling heavy; Williams
 “ “ sick, 2nd mate at duty; Bar. 29.20.
- Oct. 24, Fresh gale; ship laboring and straining.

- Oct. 25, P. M. Gale commences at once with renewed
 “ “ force; 4 o'clock, high dangerous sea running,
 “ “ shipping large bodies of water; no fresh water
 “ “ served out; poor chance to get fore and aft.
 “ “ A. M. Cook laid up; Huxley, A. B., Breiner,
 “ “ A. B., Williams, A. B., and Cluinie, in galley—
 “ “ four hands from port watch; 5 A. M., still
 “ “ blowing hard gale; ship laboring and straining
 “ “ badly; all houses on deck flooded; short of
 “ “ water for dinner; fore hold and 'tween decks
 “ “ fair flooded; must have had large quantities
 “ “ of water below through the seams.

(On the two pages that follow is a summary of the gear, blocks, sheaves, and cabin stores lost, broken and carried away or otherwise destroyed by the recent heavy weather.)

- Oct. 26, P. M. Gale from S. W. still continues, ship
 “ “ laboring and straining badly, decks still
 “ “ flooded fore and aft; short of fresh water,
 “ “ could not get to the pump; midnight, sea
 “ “ going down. 8 A. M. Took forward and
 “ “ after hatches off, find the cargo saturated
 “ “ with water through the excessive straining of
 “ “ the ship and decks; about nine weeks' supply
 “ “ of fresh water remaining; Williams, Breiner,
 “ “ and Huxley, A. Bs., sick.
- Oct. 27, After grave consideration, and consultation
 “ “ with officers and tradesmen, re the damage
 “ “ done to the ship since Sept. 27 to date and
 “ “ the continuous wind and storms encountered,

- “ “ and the state of the ship generally, settling
 “ “ down with the constant leakage through the
 “ “ decks after the great laboring and straining,
 “ “ decided to throw overboard from the ends of
 “ “ the ship, fore and after hatches, about 50
 “ “ tons in all. A start was made at noon with
 “ “ all hands at the fore hatch and 440, 220 in all,
 “ “ R. A. wet casks taken up; started after hatch
 “ “ and put out about the same amount; secured
 “ “ the rest of the cargo below, and battened
 “ “ down; at noon the inner jib bee block again
 “ “ carried away; secured sail and stay; Hansen
 “ “ and Williams sick; Breiner returned. Bar.
 “ “ 29.40.
- Oct. 28, P. M. Freshening gale; 4 P. M., fresh gale;
 “ “ 8 P. M., hard squalls, rain and sleet; midnight,
 “ “ the same. Bar. 29.30.
- Oct. 29. P. M. High gale and considerable sea run-
 “ “ ning, occasional seas coming on board; mid-
 “ “ night, strong squall, ship rolling heavily,
 “ “ straining aloft. Foster and Williams sick,
 “ “ Hansen returned.
- Oct. 30, P. M. Fresh Westerly gale and heavy sea,
 “ “ ship rolling and straining heavy, flooding the
 “ “ decks. Noon, hard gale, high sea. Williams
 “ “ on sick list.
- Oct. 31, Still continues fresh gale with high sea, ship
 “ “ rolling heavy, straining badly aloft, filling the
 “ “ decks at times; midnight, more moderate, sea
 “ “ going down. 8 A. M., took off after hatches

- “ “ and secured the cases from the after part
 “ “ more forward; carpenter overhauling below.
 “ “ Bar. 29.50.
- Nov. 1, 10 P. M. Squally; ship laboring some.
- Nov. 2, Midnight, hard gale, squalls; 5 A. M., hard
 “ “ squalls. Noon, shipping much water, hard
 “ “ squalls, heavy lurching aloft. Williams taking
 “ “ wheel and Breiner and Ask, A. B., sick, three
 “ “ from the port watch.
- Nov. 3, P. M. Fresh gale, with hard squalls, high
 “ “ sea, shipping much water, straining badly.
 “ “ A. M. Ship rolling heavy. Williams, Breiner
 “ “ and Ask returned; Foster, A. B., sick.
- Nov. 4, (108 days out—going East). P. M. Rolling
 “ “ about and filling the decks; sea running in
 “ “ both ways from N. W. to S. W.; 4 P. M., the
 “ “ same, doing no good; 6 P. M., tremendous
 “ “ rolling, and fearing the masts, put the ship
 “ “ off before the wind, and the ship doing no
 “ “ good, as shown from former positions, decided
 “ “ to run East by Cape of Good Hope.
- Nov. 5, P. M. Heavy roll of Westerly sea. Noon,
 “ “ plenty rolling.
- Nov. 6, P. M. Ship rolling heavy, straining aloft;
 “ “ midnight, clearing up. Foster sick.
- Nov. 7, P. M. Commences with fresh gale from N.
 “ “ W. Foster still sick.
- Nov. 8, P. M. Strong gale from N. W.; 8 P. M.,
 “ “ squalls still severe. A. M. Had fore hatches
 “ “ off; 'tween decks and hold look much better.
 “ “ Bar. 29.50.

- Nov. 10, P. M. Sea rolling up from N. W.; at mid-
 “ “ night suddenly gale broke with terrific force,
 “ “ ship laying right down, with only close reefs,
 “ “ continues until 2 A. M., leaving a tremendous
 “ “ sea, breaking at times; 4 A. M., sea still
 “ “ wicked, shipping large quantities of water
 “ “ fore and aft; ship laboring very badly, labor-
 “ “ ing to such an extent that we are afraid of
 “ “ our masts; feel sure that the cargo in lower
 “ “ hold must have broken adrift and settled down
 “ “ during the heavy weather we experienced off
 “ “ Cape Horn; the constant flooding of the decks
 “ “ has not as yet allowed us to fully ascertain the
 “ “ condition of the cargo in the lower hold. Bar.
 “ “ 29.50. Foster still sick.
- Nov. 11, P. M. Ship still rolling heavy and straining
 “ “ aloft. Noon. Fine and pleasant.
- Nov. 12, P. M. Sea still keeps up, ship rolling con-
 “ “ siderable, heavy swell from N. W. A. M.
 “ “ Calms; 8 A. M., falling off into the sea, rolling
 “ “ tremendous, heavy strain on masts and rig-
 “ “ ging.
- Nov. 13, Noon. Fresh gale from the Eastward. Bar.
 “ “ 29.40.
- Nov. 14, P. M. Strong gale from S. E.; 4 P. M.,
 “ “ hard gale; 6 P. M., the same; midnight, sea
 “ “ running cross, ship rolling and tumbling about,
 “ “ shipping quantities of water. Foster again
 “ “ laid up. Bar. 29.50.

- Nov. 15. P. M. Heavy Westerly sea rolling up; mid-
 “ “ night, fresh gales with squalls. 1:20 A. M.,
 “ “ high gale, choppy sea breaking on board all
 “ “ over. Bar. 29.40.
- Nov. 16, P. M. Hard squalls from S. W. with heavy
 “ “ sea on, shipping large bodies of water, rolling
 “ “ and straining badly. A. M. Still shipping
 “ “ plenty of water.
- Nov. 18, Noon. Fresh gale, sea making. Foster still
 “ “ sick.
- Nov. 19, P. M. Strong gale with hard squalls; 8
 “ “ P. M., shipping heavy water all over; 9 P. M.,
 “ “ gale continues with increased force, raising a
 “ “ tremendous sea, ship laboring and straining,
 “ “ decks constantly full of water; midnight, the
 “ “ same, no abatement. A. M. The same. Bar-
 “ “ ometer, 29.40, falling; find the gear at main
 “ “ mast and rigging all washed down from pins
 “ “ and towing at scuppers and ports; damage to
 “ “ pots, etc., in galley. Noon. Less wind, but sea
 “ “ still running high.
- Nov. 20. P. M. High gale with tremendous sea
 “ “ running; 6 P. M., blowing with hurricane
 “ “ force, ship laboring and straining to keep
 “ “ free from heavy seas breaking at times fore
 “ “ and aft, flooding every part. 4 A. M. Shipped
 “ “ sea over lee quarter, knocking cabin door in
 “ “ chart house open, flooding the cabin and chart
 “ “ room, finding its way to store room, and dam-
 “ “ aging a quantity of stores; cook badly off for

- “ “ pots; 10 A. M., sea still running high, but not
 “ “ with such force; again short of fresh water.
 “ “ Foster still sick.
- Nov. 21, P. M. A. M. Sea rolling up from
 “ “ S. W., causing ship to roll badly, straining
 “ “ aloft; find the bands on the upper main top-
 “ “ gallant yard, in the slings of the yard, all
 “ “ adrift; decided calling at an Australian Port,
 “ “ possibly Sidney, N. S. W. Foster still sick.
- Nov. 22, P. M. Cross sea from S. W., causing the ship
 “ “ to roll heavy, shipping large quantities of
 “ “ water at short intervals, straining aloft badly;
 “ “ the cook reports his last saucepan broken; the
 “ “ Captain reports Parkes chronometer stopped
 “ “ four hours after winding up; cleaning out
 “ “ paint drums for cooking. Foster still sick.
- Dec. 5, Midnight. Fresh gale, squally. A. M. The
 “ “ same, shipping quantities of water, most
 “ “ amidships.
- Dec. 9, Midnight. Ship running with whole topsail,
 “ “ cross sea, shipping quantities of water; 5 A.
 “ “ M., the same.
- Dec. 10, 8 P. M. Increasing breezes; midnight, the
 “ “ same. 2 A. M. Fresh, N. W., sea still
 “ “ running, shipping bodies of water.
- Dec. 13, Midnight, strong breezes, shipping large quan-
 “ “ ties of water. 8 A. M., gale still blowing
 “ “ hard; noon, heavy sea.
- Dec. 14, P. M. Fresh gale from S. W., heavy sea
 “ “ running, shipping large bodies of water.

- Dec. 18, 8 P. M. Fresh gale, high sea, shipping
 “ “ water; midnight, the same. A. M., the same;
 “ “ noon, fresh gale increasing.
- Dec. 19, P. M. Fresh gale, high sea; 4 P. M., high
 “ “ gale, shipping water.
- Dec. 21, P. M. High sea running, shipping quantities
 “ “ of water.
- Dec. 24, 7 P. M. Wind shifted to S. W., increasing
 “ “ gale; 8 P. M., height of gale. Noon. Ship-
 “ “ ping heavy water.
- Dec. 25, P. M. High gale from S. W., heavy sea run-
 “ “ ning, shipping large bodies of water, decks
 “ “ full at times; 8 P. M., still continues. Noon.
 “ “ Still heavy swell, ship rolling gunwales under
 “ “ both sides.
- Dec. 26, P. M. Sea going down, still heavy swell from
 “ “ S. W., ship rolling and tumbling about, decks
 “ “ full of water at intervals.
- 1900.
- Jan. 10, 8 P. M. In wearing ship, heard something go
 “ “ “bang” at the steering gear and at 8:30
 “ “ another clang; took off steering cover, and
 “ “ found the pin on the port side of rudder head
 “ “ broken in two and the arm hanging down;
 “ “ put on relieving tackles and made temporary
 “ “ repairs.
- Jan. 11, 8 P. M. Fresh gale from the Northward.
- Jan. 12, 2:30 P. M., anchored in Watson’s Bay.

No. 1171

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

E. J. COTTON, J. B. AGASSIZ, and C. E.
COTTON, Copartners Doing Business
Under the Firm Name and Style of COT-
TON BROTHERS AND COMPANY,

Appellants,

vs.

MARY K. ALMY,

Appellee.

FEB

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District
Court for the District of
Hawaii.



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*In the District Court of the United States in and for the
District of Hawaii.*

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.
E. COTTON, Copartners Doing Busi-
ness Under the Firm Name and Style
of COTTON BROTHERS AND COM-
PANY,

Libelees.

Statement.

September 21st, 1903: Verified libel was filed and citation was issued to the United States Marshal for the District of Hawaii.

Names of the Original Parties to the Action.

Libelant: Mary K. Almy.

Libelee; E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners, doing business under the firm name and style of Cotton Brothers and Company.

Dates of the Filing of the Pleadings.

September 21st, 1903: Libel.

October 2d, 1903: Answer of E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners, doing business under the firm name and style of Cotton Brothers and Company.

Service of Process.

September 21st, 1903: Citation issued and delivered to the United States Marshal for the District of Hawaii.

Said citation afterward returned into court with the following return by the United States Marshal: "I have served this writ personally by copy on E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, the within-named defendants, by delivering to and leaving with A. S. Cantin, Esq., known to me to be their attorney in fact, a true copy thereof, to which was then and there attached a true copy of the libel in the above-entitled action on this 2st day of September, A. D. 1903."

May 19th, May 20th, May 23d and May 24th, 1904: The above-entitled cause was heard on said dates in the United States District Court for the Territory of Hawaii, at the city of Honolulu, before the Honorable Sanford B. Dole, Judge of said Court.

September 15th, 1904: Decision filed.

September 21st, 1904: A final decree in the above-entitled cause was filed and entered.

September 23d, 1904: Notice of appeal in the above-entitled cause was this day served and filed.

*In the District Court of the United States in and for the
District of Hawaii.*

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.
E. COTTON, Copartners Doing Busi-
ness Under the Firm Name and Style
of COTTON BROTHERS AND COM-
PANY,

Libelees.

Libel in Personam.

To the Honorable MORRIS M. ESTEE, Judge of the
District Court of the United States, in and for the
District of Hawaii.

The libel of Mary K. Almy of said District, against
E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners
doing business under the firm name and style of Cotton
Brothers and Company, in a cause of damages, civil and
maritime, alleges as follows:

First.—This libelant respectfully shows that she is
over 21 years of age; that she is a married woman; and
that she is a resident of said District. Libelant further
shows that during all the times herein mentioned, said
libelees above named, to wit, said E. J. Cotton, J. B.
Agassiz and C. E. Cotton were, and still are, copartners
under the firm name and style of Cotton Brothers and

Company, and doing business as such copartners in said District as bridge builders and general contractors and engineers and builders of all kinds of bridge work, pile-driving and wharves.

Second.—That during all the times herein mentioned, and up to the 4th day of August, 1903, hereinafter referred to, said libelant was the owner of a certain boat, vessel and water craft, commonly called a "House-boat," used and capable of being used as a means of transportation on navigable waters; that said house-boat, during all of said times, was the sole and separate property of said libelant, free from the management, control, debts and obligations of libelant's husband; that the value of said house-boat, during all of said times, and up to said August 4th, 1903, was the sum and amount of twenty-five hundred (\$2500) dollars, in lawful money of the United States; and that on the 1st day of January, A. D. 1903, the defendants and libelees above named did lease said house-boat from said libelant under and pursuant to the terms of that certain written lease, a true copy whereof is hereto attached, marked Exhibit "A," and expressly made a part of this libel.

Third.—This libelant shows that the loss and damage hereinafter referred to were caused by, and received in consequence of a marine tort occurring within the admiralty jurisdiction of said Court; and in this behalf libelant shows that the facts and circumstances constituting said marine tort and the loss and damage caused thereby to this libelant occurred wholly and entirely

upon navigable waters within the jurisdiction of said Court.

Fourth.—This libelant further shows that at the time of the facts and circumstances constituting said loss and damage and said marine tort, said house-boat was wholly and entirely in the possession and under the control of the above-named libelees under and pursuant to the aforesaid lease; that neither said libelant nor any agent or representative of hers was, at said times, either in charge or aboard of said house-boat; and that neither said libelant nor any agent or representative of hers, directly or indirectly, participated in said facts and circumstances constituting said marine tort, and that said libelant was wholly ignorant of said loss and damage until after the same had occurred and accrued.

Fifth.—This libelant further shows that on August 4th, 1903, within the jurisdiction of said Court to wit, upon navigable waters near the harbor and port of Honolulu, in the Island of Oahu, in the Territory and District of Hawaii, while said house-boat was in the sole and exclusive possession and control of said libelees under and pursuant to said lease, by, through and in direct and immediate consequence of the carelessness and negligence of said libelees and defendants, and without any fault, carelessness or negligence upon the part of this libelant, said house-boat became and was wrecked in and upon said navigable waters within said jurisdiction, and became and was and is now a total loss; and in this behalf, this libelant now avers and sets forth

the fact constituting said carelessness and negligence of said defendants and libelees as follows, to wit:

Prior to said August 4th, 1903, said defendants and libelees, in whose sole and exclusive possession and control said house-boat then was, had moored said house-boat near the western shore of the entrance to Pearl Harbor, in said Island of Oahu; and on said August 4th, 1903, said defendants and libelees proceeded to remove said house-boat from said Pearl Harbor to the harbor of Honolulu, in said Island of Oahu. Said transportation was then and there attempted to be performed by said defendants and libelees by towing said house-boat in tow of the steam tug "Kaena," then and there operated and controlled by said defendants and said libelees. Libelant further shows that at said time and place, and along with said house-boat, said defendants and libelees undertook to transport by towing in tow of said "Kaena," from said Pearl Harbor to said Honolulu harbor, and as part and parcel of the same tow of which said house-boat formed a part, two laden scows. It was then and there the duty of said defendants and libelees, in making up said tow, to see that it was then and there properly constructed, but this duty said defendants and libelees, by reason of the aforesaid carelessness and negligence, wholly failed and neglected to perform; and in this behalf, this libelant shows that said tow was constructed in tandem, and was then and there so constructed that said house-boat was placed between said tug "Kaena" and said two laden scows hereinabove referred to. Libelant further shows that

when said tandem tow was constructed, said tug proceeded from said Pearl Harbor to said Honolulu harbor. At this time a fresh breeze was blowing, the wind being about N. E. by E., a fairly heavy sea was running, and there was a substantial swell. Libelant shows that when said tug and tow had reached a point about one-half mile west of Kalihi entrance, said house-boat, by reason of the aforesaid carelessness and negligence of defendants and libelees, capsized and sank, and became a wreck and total loss; and in this behalf, this libelant shows that the superstructure of said house-boat contained two stories, with three rooms in the lower story and two rooms and a lanai in the upper story, and that when, as alleged, said house-boat capsized and sank and became wrecked, said entire superstructure, by reason thereof and in direct consequence of said capsizing, sinking and wreck, became detached and broken away from said house-boat, thereby utterly ruining and destroying said house-boat and rendering it wholly useless and valueless for the uses and purposes for which it was intended and held. And in this behalf, libelant shows that said loss and damage were then and there immediately, directly and proximately caused by the carelessness and negligence of said defendants and libelees; and in particular by the careless and negligent manner and method in which the aforesaid tug and tow were then and there operated by said defendants and libelees; and in particular by the careless and negligent manner in which said tow was constructed and made up by said defendants and libelees; and in par-

ticular by the careless and negligent selection by said defendants and libelees of the time at which said towage was attempted, having regard to the conditions of wind and sea then prevailing; and in particular by the careless and negligent attempt of said defendants and libelees to tow too much upon the occasion hereinabove alleged.

Sixth.—This libelant further shows that by reason of the premises, and by reason of the aforesaid carelessness and negligence, said house-boat became and was wrecked as above alleged, and became and was and is now a total loss; whereby, and by reason of all the premises, this libelant has suffered and sustained loss and damage in the sum and amount of two thousand five hundred (\$2,500) dollars in lawful money of the United States.

Seventh.—That said loss and damage received and sustained by said libelant, as aforesaid, were occasioned, caused and brought about wholly by reason of the carelessness and negligence of said defendants and libelees, and without any fault, want of care, or negligence on the part of said libelant; and that all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

Wherefore, said libelant prays that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue herein against the said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business

under the firm name and style of Cotton Brothers and Company; and that they may be required to answer upon oath this libel and all and singular the matters aforesaid; and that this Honorable Court will be pleased to decree the payment of the damages aforesaid, together with costs; and this libelant may have such other and further relief as in law and justice she may be entitled to receive.

MARY K. ALMY,
Libelant.

A. S. HUMPHREYS and
J. J. DUNNE,
Proctors for said Libelant.

United States of America, }
District of Hawaii. } ss.

Mary K. Almy, the libelant named in the foregoing libel, being first duly sworn, deposes and says that she is the libelant named in the foregoing libel and that she has heard read said libel; that she knows the contents thereof; that said libel is true as to all matters therein stated as of her own knowledge; and that as to the matters therein stated upon information or belief, she believes it to be true.

MARY K. ALMY.

Subscribed and sworn to before me this 21st day of September, A. D. 1903.

[Seal] CLARE F. WEBSTER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Exhibit "A."

This indenture of lease made this first day of January, A. D. 1903, by and between Mary K. Almy, of Honolulu, Island of Oahu, Territory of Hawaii, hereinafter designated as the lessor of the first part, and Cotton Brothers and Company, a firm doing business at Honolulu aforesaid, hereinafter designated as the lessees of the second part,

Witnesseth: That said lessor, for and in consideration of the agreements and covenants on the part of said lessees hereinbelow mentioned, does hereby demise and lease unto said lessees that certain two-story house-boat now lying at Pearl Harbor, Oahu, together with all furniture therein contained as per inventory hereto attached and made a part hereof.

To have and to hold the same unto said lessees, their heirs, successors or assigns, for the term of six (6) months from the first day of January, A. D. 1903, with the privilege of and extension thereof from month to month, said extension not to exceed three months.

Yielding and paying therefor rent at the rate of seventy-five dollars (\$75.00) per month.

And said lessor hereby covenants with said lessees, their heirs, successors and assigns, that they shall peaceably hold and enjoy said house-boat and furniture as aforesaid.

And said lessees, for themselves and their heirs, successors and assigns, hereby covenant with said lessor, her heirs, representatives and assigns, that they and their legal representatives will pay the said rent in man-

ner aforesaid; that they will not remove said house-boat from the limits of Pearl Harbor, Oahu; that they will provide proper moorings and shall be liable for all damages to said house-boat from stranding or wreck; that in case of total loss of the house-boat that the lessees will pay unto the lessors the sum of \$2500.00, and that at the end of said term or sooner termination thereof they will return the same in good order and condition, ordinary wear and tear excepted. Lessees shall not be liable for any damage by fire.

And it is hereby agreed between the parties hereto that if any rents shall be due and unpaid, or if default shall be made in any of the covenants hereinbefore contained, then it shall be lawful for said lessor, her heirs, legal representatives or assigns, to take possession of the said house-boat and furniture and expel and remove said lessees and all persons claiming by, through or under them therefrom.

In witness whereof said parties have hereunto set their hands and seals to this and to another instrument of like tenor and date on the day and year first above written.

MARY K. ALMY,
COTTON BROS. & CO.

A. S. CANTIN,
Witness.

[Endorsed]: Title of Court and Cause. Libel in Personam. Filed Sept. 21, 1903. W. B. Maling, Clerk.

No. 39.

UNITED STATES OF AMERICA.

*District Court of the United States, for the Territory of
Hawaii.*

Libelant's Bond for Costs.

Whereas, a libel was filed in this court on the 21st day of September, in the year of our Lord one thousand nine hundred and three, by Mary K. Almy against E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners under firm name, Cotton Brothers and Company, for reasons and causes in the said libel mentioned, and the said Mary K. Almy and James D. McInerny, her surety, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the said Mary K. Almy or her surety, execution may issue against their goods, chattels and lands for the sum of two hundred dollars.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the undersigned shall be, and each of them is, bound in the sum of two hundred dollars conditioned the libelant above named shall pay all costs and charges that may be awarded against her in any decree by this Court, or, in case of appeal, by the Appellate Court.

MARY K. ALMY.

JAMES D. McINERNY.

Taken and acknowledged this 21st day of September, 1903, before me,

[Seal]

W. B. MALING,
Clerk.

Territory of Hawaii—ss.

James D. McInerny, parties to the above stipulation, being duly sworn, do depose and say, each for himself, that he is a resident freeholder in said Territory; that he is worth the sum of five hundred dollars, over and above all his debts and liabilities, and that his property is situate in said Territory and subject to execution.

JAMES D. McINERNY.

Sworn to this 21st day of September, 1903, before me,

[Seal]

W. B. MALING,
Clerk.

Filed the 21st day of September, 1903. W. B. Maling,
Clerk.

UNITED STATES OF AMERICA.

In the District Court of the United States, for the Territory of Hawaii.

Citation.

The President of the United States of America, to the Marshal of the United States of America, for the Territory of Hawaii, Greeting:

Whereas, a libel has been filed in the District Court of the United States for the Territory of Hawaii, on the 21st day of September, A. D. 1903—

By Mary K. Almy, Libelant, vs. E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees in a certain action for damages, civil and maritime, to recover the sum of \$2500.00 (as by said libel, reference being hereby made thereto, will more fully and at large appear), therein alleged to be due the said libelant Mary K. Almy, and praying that a citation may issue against the said respondents, pursuant to the rules and practice of this Court: Now, therefore, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondents, if they shall be found in your District, that they be and appear before the said District Court, on Friday, the 2d day of October, A. D. 1903, at the courtroom in the city of Honolulu, then and there to answer the said libel, and to make their allegations in that behalf: and have you then and there this writ, with your return thereon.

Witness the Honorable MORRIS M. ESTEE, Judge of said Court, at the city of Honolulu, in the Territory of Hawaii, this 21st day of September, A. D. 1903, and of the independence of the United States the one hundred and twenty-eighth.

[Seal]

W. B. MALING,
Clerk.

A. S. HUMPHREYS and
J. J. DUNNE,

Proctors.

Marshal's Return.

I have served this writ personally by copy on E. J. Cotton, J. B. Agassiz, and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, the within named defendants, by delivering to and leaving with A. S. Cantin, Esq., known to me to be their attorney in fact, a true copy thereof, to which was then and there attached a true copy of the libel in the above-entitled action, on this 21st day of September, A. D. 1903.

E. R. HENDRY,
United States Marshal.

[Endorsed]: Title of Court and Cause. Filed September 21st, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

No. 39.

UNITED STATES OF AMERICA.

*District Court of the United States, for the Territory of
Hawaii.*

Libelees' Bond for Costs.

Whereas, a libel was filed in this court on the 21st day of September, in the year of our Lord one thousand nine hundred and three, by Mary K. Almy vs. E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, for reasons and causes in the said libel mentioned, and the said Cotton Brothers and Company and

John Ouderkirk, and John Emmeluth, its sureties, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the said Cotton Brothers and Company or its sureties, execution may issue against their goods, chattels and lands for the sum of two hundred dollars:

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the undersigned shall be, and each of them is, bound in the above-named sum of two hundred dollars, conditioned the libelees shall pay all costs and charges that may be awarded against them in any decree by this Court, or, in case of appeal, by the Appellate Court.

COTTON BROS. & CO.

Per A. S. CANTIN,

Attorney in Fact.

JOHN OUDERKIRK.

JOHN EMMELUTH.

Taken and acknowledged this 2d day of October, 1903, before me,

[Seal]

FRANK L. HATCH,

Deputy Clerk, United States District Court, Territory of Hawaii.

Territory of Hawaii—ss.

John Ouderkirk and John Emmeluth, parties to the above stipulation, being duly sworn, do depose and say, each for himself that he is a resident freeholder in said Territory; that he is worth the sum of five hundred dollars, over and above all his debts and liabilities; and

that his property is situate in said Territory and subject to execution.

JOHN OUDERKIRK.

JOHN EMMELUTH.

Sworn to this 2d day of October, 1903, before me,

[Seal]

FRANK L. HATCH,

Deputy Clerk.

Filed the 2d day of October, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States in and for the District of Hawaii.

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C. E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

Appearance of Counsel for Libelees.

Sir:

You will please to enter our appearance as proctors for the defendants in this cause.

October 2, 1903.

A. L. C. ATKINSON and

R. W. BRECKONS,

Proctors.

To Walter B. Maling, Esq., Clerk.

[Endorsed]. Title of Court and Cause. Filed October 2d, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.

E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

Answer.

To the Honorable MORRIS M. ESTEE, Judge of the District Court of the United States for the Territory of Hawaii:

Come now E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees in the above-entitled cause, and for answer to the libel and complaint of Mary K. Almy against the said Cotton Brothers and Company, propound as follows:

First.—They admit each and every allegation in the first article of said libel contained.

Second.—That the allegations set forth in the second, third, fourth, fifth, sixth and seventh articles of said libel are in great part untrue and that the truth as to the matters therein stated is as follows:

That during all of the times mentioned in said libel, and up to the 4th day of August, A. D. 1903, the said libelant was the owner of a certain boat, commonly called a "House-boat," used and capable of being used as a means of transportation on navigable waters; that during all of said times, the husband of the said libelant was in control and charge of said boat, and acting as the agent of the said libelant in and concerning the same; that the value of the said house-boat during all of the said times, and up to the 4th day of August, A. D. 1903, was the sum and amount of fifteen hundred dollars (\$1500.00), that on the first day of January, A. D. 1903, the defendants and libelees herein did lease said house-boat from libelant, under and pursuant to the terms of the written lease, of which a true copy is attached to said libel; that at the time said lease was entered into; and under and by virtue of the terms thereof, the said house-boat was delivered by the said libelant, through her said husband, to the said libelees, at Pearl Harbor, situated some ten miles distant from the said Honolulu; that under and pursuant to the terms of said lease, it became the duty of the libelees, at the termination thereof, to redeliver to said libelant said house-boat, at said Pearl Harbor; that said lease was, in accordance with the terms thereof, terminated on the 29th day of July, A. D. 1903; that said libelant was notified

of the termination of said lease; and that she, the said libelant, might take possession of said boat; that at no time subsequent to the said 29th day of July, A. D. 1903, was said house-boat in the possession of the said libelees, under or by virtue of said lease and at no time after said 29th day of July, A. D. 1903, were the said libelees, or either of them, in the sole possession or control of said house-boat, under or pursuant to the terms of said lease; that at the termination of the lease aforesaid, as hereinbefore set forth, the said libelant requested the said libelees to remove said house-boat from Pearl Harbor to the port of Honolulu, for the convenience of said libelant; that thereupon, and solely as a favor to and for the convenience of said libelant, said libelees agreed to so remove said boat, under the express stipulation and agreement, however, that the said libelees would in no manner be responsible for any loss or damage to said house-boat which might occur while said boat was being moved to said port of Honolulu; that under and pursuant to said request of said libelant and under said stipulation and agreement so entered into said libelees did, on the 4th day of August, A. D. 1903, proceed to remove said house-boat from said Pearl Harbor to the Harbor of Honolulu, in said Island of Oahu. That said removal, under and pursuant to said request and under said stipulation and agreement so entered into, was attempted to be performed by said libelees by towing said house-boat in tow of the steam tug "Kaena" then and there operated and controlled by these libelees; that at said time and place, and along with said house-boat,

said libelees undertook to transport by towing in tow of said "Kaena" from said Pearl Harbor to said Honolulu Harbor, and as part and parcel of the same tow of which said house-boat formed a part, two laden scows; that said tow was constructed in a proper and seaman-like manner, and that in constructing the same in said manner said libelees exercised due care in the premises, and were guilty of neither carelessness nor negligence in relation thereto; that when said tow was so constructed, said tug proceeded from said Pearl Harbor to said Honolulu harbor; that at this time a light breeze was blowing, the sea was smooth, and there was no appreciable swell; that when said tug and tow had reached a point about one half mile west of Kalihi entrance, the said house-boat, without any carelessness or negligence on the part of these libelees, suddenly went over on one side; that thereupon said libelees towed the said house-boat into water where said house-boat could be anchored, and anchored said house-boat, and proceeded with said tug to Honolulu, with the persons who had been on board of the said house-boat, and with the said laden scows; that after the arrival of the said tug and the said laden scows at Honolulu harbor, the said tug proceeded back to the spot where the said house-boat had been anchored, and started to tow the said house-boat into the harbor of Honolulu; that said house-boat was brought to said harbor, and a watchman was left in charge by said libelees; that said house-boat turned over; that the turning over of said house-boat was not due in any manner to the carelessness or negligence of

the said libelees, but was, as libelees are informed and believe, and so charge the fact to be, due to the fact that the said boat was not properly built into the scow, but when originally constructed, was simply tacked to said scow with tenpenny nails, which became gradually loosened from the rocking of the scow.

And libelees further show in this behalf that the said house-boat is not now a total loss, and that said libelant has not suffered or sustained loss or damage in the sum or amount of two thousand five hundred dollars (\$2,500.00), as alleged in said libel.

Third.—That all and singular the premises are true, in verification thereof, if denied, said libelees crave leave to refer to the depositions and other proofs to be exhibited by them in this cause.

Wherefore, said libelees pray that this Honorable Court will be pleased to pronounce against the libel aforesaid, and to condemn the libelant in costs, and otherwise right and justice to administer in the premises.

E. J. COTTON,

J. B. AGASSIZ,

C. E. COTTON,

Copartners Doing Business Under the Firm Name and
Style of COTTON BROTHERS & COMPANY.

By their Attorney in Fact,

A. S. CANTIN.

A. L. C. ATKINSON and

R. W. BRECKONS,

Proctors.

United States of America, }
Territory of Hawaii. } ss.

A. S. Cantin, being first duly sworn according to law, deposes and says that he is the attorney in fact and agent of the libelees, E. C. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, and that each of the members of the said copartnership are at present in the State of California; that he has read the above and foregoing answer, and knows the contents thereof, and that the same is true; that he is acquainted with the facts set forth in said answer from the fact that he has been in charge of the business of said libelees in Honolulu for six months last past; the reason that this affidavit is made by deponent is that none of the libelees are within this district or within one hundred miles of Honolulu; deponent's means of information are letters from said libelees.

A. S. CANTIN.

Subscribed and sworn to before me this 2d day of October, A. D. 1903.

[Seal]

FRANK L. HATCH,

Deputy Clerk, United States District Court, Territory of Hawaii.

[Endorsed]: Title of Court and Cause. Filed October 2d, 1903. W. B. Maling, Clerk. By Frank L. Hatch, Deputy Clerk.

From Minutes U. S. District Court, Vol. 2, Page 477,
Friday, October 2, 1903.

[Title of Court and Cause.]

Order Passing Case.

This being the return day herein, by order of the Court, the Marshal made due proclamation according to law, and thereupon, on motion of R. W. Breckons, Esq., of proctors for the libelees, and by consent of proctors for the libelant, it is ordered that this case be passed for the purpose of taking depositions.

From Minutes U. S. District Court, Vol. 3, Page 36, Monday, May 9, 1904.

[Title of Court and Cause.]

Order Setting Time of Trial.

Upon motion of Mr. J. J. Dunne, of proctors for the libelants, it is ordered that this cause be set for trial on Thursday, May 19, 1904, at 10 o'clock, A. M.

From Minutes U. S. District Court, Vol. 3, Page 49,
Thursday, May 19, 1904.

[Title of Court and Cause.]

Trial.

This cause came on regularly this day for trial, counsel for both sides being present in open court. It was ordered by the Court, both sides consenting thereto,

that if a transcript of the testimony in this cause is required, the cost of said transcript shall be taxed as a cost to be paid by the losing party. And thereupon the trial is proceeded with the introduction of evidence on behalf of the libelant. And thereupon on motion of the libelees it is ordered that the further hearing of this cause be continued until Friday morning, May 20th, 1904, at 10 o'clock. And it was further ordered that all persons subpoenaed to be present in this case to-day shall appear in court at said hour and date.

From Minutes U. S. District Court, Vol. 3, Page 50, Friday, May 20, 1904.

[Title of Court and Cause.]

Order Continuing Trial.

Now, on this day, it was ordered by the Court that the further trial of this cause be had on Monday, May 23d, 1904, at 10 o'clock, A. M.

From Minutes U. S. District Court, Vol. 3, Page 54, Monday, May 23, 1904.

[Title of Court and Cause.]

Trial (Continued).

This cause came on regularly this day for continued trial, proctors for both sides being present in open court, and thereupon the trial is proceeded with by the introduction of evidence. And the hour for adjourn-

ment having arrived, the further trial of this cause is continued until Tuesday, May 24, 1904, at 9:30 o'clock, A. M.

From Minutes U. S. District Court, Vol. 3, Page 55, Tuesday, May 24, 1904.

[Title of Court and Cause.]

Trial (Continued).

This cause came on regularly this day for continued trial, proctors for both sides being present in open court, and thereupon the trial is proceeded with by the introduction of further evidence, at the conclusion of which the case is submitted to the Court without argument, each side to have two weeks' time within which to file briefs. And it is further ordered that the reporter transcribe the testimony herein and file it; the cost of such transcript to be taxed as a cost against the losing side.

*In the District Court of the United States, in and for the
Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

COTTON BROTHERS & COMPANY

(a Corporation),

Libelee.

No. 39.

Testimony.

Appearances:

For Libelant, Messrs. J. J. DUNNE and A. S.
HUMPHREYS.

For Libelee, Messrs. A. F. JUDD and R. W.
BRECKONS.

GEO. P. THIELEN, Reporter.

Thursday, May 19th, 1904.

Morning Session.

Mr. DUNNE.—By consent, I will offer in evidence the lease in this case and ask that it be marked Libelant's Exhibit No. 1.

Mr. ALLAN DUNN, called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. I will ask you, Mr. Dunn, where you reside?

(Testimony of Allan Dunn.)

A. In Honolulu, Island of Oahu.

Q. How long have you been living here?

A. Six years next April.

Q. I will ask you if you know Pearl Harbor, on this island? A. I do.

Q. And I will ask you further if you know, if you knew, the house-boat which formerly belonged to Mrs. Almy? A. I do.

Q. Now, on August 4th, 1903, where were you?

A. I was in Pearl Harbor, on board the yacht "Glayds."

Q. Who, if anyone, was with you?

A. T. W. Hobron.

Q. On that day how long did you remain, if at all, in Pearl Harbor?

A. I remained in Pearl Harbor until approximately half-past four that afternoon. We started to sail out—I probably left Pearl Harbor at five or a few minutes after.

Q. When you say you started to sail out, what do you mean by that?

A. I mean I was anchored about a mile from the bar, near the place called the "shark pen" and marked on the map of Pearl Harbor as that; that at about half-past four we pulled up the anchor we had aboard the yacht, hoisted sail and started to sail out of the harbor.

Q. Where was the yacht "Glayds" bound to at that time? A. Honolulu.

(Testimony of Allan Dunn.)

Q. After you made sail and proceeded towards Honolulu, what, if anything, did you see?

A. We saw towards Honolulu and slightly to seaward, about a mile to sea and possibly a mile towards Honolulu—possibly a mile and a half in a direct line of sailing, a tug, having in tow a large object and back of that two smaller objects.

Q. I will ask you if at that time you were able to recognize that tug?

A. We recognized the tug in this manner: we knew that the "Kaena" was the only tug in that neighborhood, and although we couldn't swear it was the "Kaena," it was our natural surmise that that was the tug.

Q. Well, later on did you get closer to it?

A. Later on I got very close to the tug and could identify it as the "Kaena."

Q. You said she was towing something. What was it the "Kaena" was towing?

A. Of course at this time she was a mile and a half away and we could only surmise. We surmised it was the house-boat belonging to Mrs. Almy. Later in we knew it was the house-boat.

Q. And identified it as such?

A. We identified it.

Q. Will you describe how that tow was made up?

A. First came the steamer "Kaena," next came cabled, from my point of view, quite a little distance of course, sea-line and sky-line between, this large object,

(Testimony of Allan Dunn.)

and behind that, two smaller objects, apparently scows loaded down probably with something that kept them not very high above the water-line.

Q. Well, what were the relative positions of the tow-boat, the house-boat and the scows?

A. First tow-boat, then the house-boat and then the scows.

Q. So that the position of the house-boat was intermediate between the tug and the scows?

A. Intermediate; between them.

Q. Is there any technical term to describe a tow of that kind?

A. Well, I don't know what you would call technical; the term is "tandem" tow.

Q. Is there any difference between a tandem tow and a spike tow, if you knew?

A. Yes; a spike tow, I suppose, requires the same arrangement as a spike team does; that is, a spike team would be where one object is placed in front and two lines lead diagonally back in different directions to the two objects behind; whereas, a tandem tow or a tandem team in my explanation would be first one object, then the next directly behind that, and the next directly behind that.

Q. And that was the kind of tow this was?

A. Yes, sir.

Q. Will you describe the conditions of wind and weather and sea at that time?

A. There was a good fresh breeze blowing at the

(Testimony of Allan Dunn.)

time. There had been from two o'clock that afternoon, which lasted well on to sunset. The breeze was sufficient to keep the "Glayds," which was going along with her lee rail in the water, in sight of the object which we had seen. I should say that part of the time it was quite a stiff breeze. We were close-hauled. The seas were, well, I suppose what a man who goes to sea would call a moderate sea. It had a heavy swell on which would make a person not used to going to sea good and seasick.

Q. I will ask you, what, if anything, there was between the tug and the house-boat?

A. A big rope cable.

Q. I will ask you how you know there was a big rope between the tug and the house-boat?

A. Because we were sailing considerably faster than the "Kaeana." We were tacking for Honolulu and got in close enough to see it; as the tug would go up and down on the waves—the waves were sufficiently large for that, quite heavy swells—the cable between the tug and the house-boat would tauten out and you could see the water it would bring up with it fall off of it.

Q. Now, do you know where the Kalihi entrance is?

A. I do.

Q. When you about abreast of that, I wish you would describe what you saw and what happened?

A. A little before we were abreast of that we noticed that the tug was close in, that is, closer in toward the reef than we imagined. We wondered how she had got-

(Testimony of Allan Dunn.)

ten in so close. She made a straight line originally for Honolulu, and on that line I should say she could not round the bell buoy. Then we saw that object over her, apparently the scow, on top of it a dark triangular object, which looked to us as if the house-boat was in trouble and was sliding off or being beaten off the top of the scow.

Q. What did you do?

A. At that time we could see that the steamer was standing off and on around this spot. We immediately came to and sailed up to it. It was not quite dark at this time and as we sailed up the tug left, stood out to sea and then started off on her course to the bell buoy.

Q. Towards Honolulu?

A. Towards Honolulu. The house-boat was well in towards the reef at this time and the tug had to stand out to sea to get its course to go around the bell buoy. We sailed up within eight or ten feet of the house-boat, what was left of it.

Q. What did you see?

A. We saw that the scow part of it was low in the water; that, I should say, less than one-half of the upper structure, the house structure, was left on top of the scow.

Q. Where was the other part?

A. The other part was in the water. The house was then breaking up. The wall which was still on the scow was leaning over very badly; it was curved. It was evidently pulling to pieces. It was quite close in towards

(Testimony of Allan Dunn.)

the reef; and after we had stayed there a little while we started on to Honolulu, keeping in close before tacking out. As we sailed we could see more and more of this superstructure sliding off. The waves, which close in towards the reef are very much heavier, were breaking over the top of the scow.

Q. How about the wind at that place?

A. The wind was slightly lessened at that time. Sailing from Pearl Harbor to Honolulu any wind at sunset, when the wind is in such direction, you would naturally get into a bald patch, a calm sea. I have very often been fishing out there just about then. What wind there would be offshore and what waves there were would be such as to set the house-boat towards the reef. She was anchored.

Q. What was the condition of the light at that time?

A. The light was sufficiently good to see everything on shore; all the houses. The lights were not up in the "Kaena" at that time. She put them out a little later.

Q. Did you have your lights on the "Glayds" up at that time?

A. We didn't put out our lights until afterwards.

Q. What did you do then after seeing this condition of things at Kalihi entrance? What became of the "Glayds"?

A. We sailed on, followed the "Kaena" around the bell buoy into the main channel. We were about—well, in time, about ten minutes behind. That is to say, she

(Testimony of Allan Dunn.)

passed the last buoy about ten minutes before the "Glayds."

Q. What time was it when the "Glayds" and "Kaena" got into Honolulu harbor?

A. That is a long time ago to say exactly, but about eight o'clock.

Q. Well, after that, what became of the "Glayds"?

A. We anchored.

Q. What became of the "Kaena"?

A. The "Kaena"? We saw her leave the harbor about an hour later.

Q. And did you notice in which direction she went?

A. She went out to sea and later came back with what was left of the scow.

Q. Did you see what was left of the scow when she came back? A. I saw it the next morning.

Q. Will you describe its condition then?

A. When I saw her the next morning, the scow was lying up against one side, I think, of Bishop wharf. There was nothing left on it but some badly smashed up lumber, light lumber, a few planks. I think, if I remember right, there was one little post sticking up in one corner. It was as if you had loaded a dozen or more pieces of broken planking on it. There was no house or sign of a house.

Q. The whole superstructure was gone?

A. Was gone entirely. Just debris left.

Q. I will ask you if you have had occasion to visit

(Testimony of Allan Dunn.)

Pearl Harbor as a yachtsman in the past five or six years? A. A great many times.

Q. About how often? Give some estimate.

A. Oh, at least one hundred times.

Q. I will ask you if you have made any observation as to the conditions of wind, weather and sea between here and Pearl Harbor at different periods of the day?

A. I have, during the day and at night, too.

Q. Is there any difference in the action of the wind between here and Pearl Harbor at different periods?

A. At what time of the year?

Q. August, the early part of August?

A. When we sailed up to Honolulu in August at that time of day and at that time of night it was decidedly calmer from twelve to five in the morning than at any other time of the day; twelve midnight I mean; under ordinary conditions, when there is no gale blowing.

Q. Well, there was a gale blowing on this occasion?

A. No.

Cross-examination.

By Mr. BRECKONS.—You have testified, Mr. Dunn, in reference to the way that tow was constructed. Where was the “Glays” situated with reference to the tow when you made these observations concerning which you have testified?

A. West of her, three-quarters of a mile.

Q. And what time of the day was it?

(Testimony of Allan Dunn.)

A. I can only speak approximately. Approximately it was a quarter of six, something like that.

Q. And could you give approximately how near it was to the entrance of Kalihi harbor at that time?

A. In mileage?

Q. No, with reference to the distance between Pearl Harbor entrance and Honolulu harbor entrance?

A. About half way.

That is all.

Mr. THOMAS HUGHES, called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. Mr. Hughes, what is your occupation?

A. Master car repairer, Oahu Railway.

Q. How long have you been engaged in that business? A. About fifteen years in this country.

Q. And I will ask you if you have any other occupation in the way of builder?

A. Yes, I have built tow-thirds of the lighters in use on these Islands—a great many of them.

Q. And have you been constructing these lighters during these fifteen years you speak of, from time to time? When did you commence building lighters?

A. About thirty years ago.

Q. And work of that character is the type of work that you have devoted your life to—building?

(Testimony of Thomas Hughes.)

A. Except the last fifteen—with the exception of about seventeen years.

Q. I will ask you if you knew Mrs. Almy's house-boat?

A. Yes, sir.

Q. How did you know that, Mr. Hughes?

A. I built it.

Q. When did you build it?

A. I don't remember just when I built it.

Q. About how long ago, as near as your memory will permit?

A. I have been so much at that kind of work in latter years I can't recollect the exact time I built it.

Q. Now, did you see anything, any portion, of that house-boat after the 4th of August, 1903?

A. I saw part of the house-boat, the hull, after the day mentioned.

Q. Where did you see it?

A. I saw it alongside the wharf.

Q. Where? A. I think at Bishop's wharf.

Q. In what port? A. Honolulu.

Q. Will you describe what you saw at that time?

A. I saw the hull; that was the only portion of it that I saw.

Q. What was the condition of the hull at that time?

A. Well, the hull was in, I should say, a pretty good condition. The hull, there were several inches of water in the bottom.

Q. Now, having built the boat and having seen her after the 4th day of August, I will ask you what it would

(Testimony of Thomas Hughes.)

cost to put that boat back in the same condition in which she was prior to the accident?

A. Well, I wouldn't undertake to put her in the same condition for less than two thousand dollars.

Q. Well, what was her value originally, if you know?

A. I don't know the exact amount. I don't know the total cost of the boat and house. The cost of the scow was seven hundred dollars, the scow alone.

Cross-examination.

(By Mr. BRECKONS.)

Q. Mr. Hughes, by putting her back in the same condition, you mean by that it would cost that much to put the superstructure on and then it would be entirely new?

A. What I mean to say is that I wouldn't undertake to contract to build the superstructure.

Q. But by the use, by the expenditure of two thousand dollars a superstructure as put on there would of course be new and would leave the boat practically new—is that what you mean? I will ask you if you would put her in as good a condition as the day before she was wrecked?

A. She would not be in as good a condition, because naturally the hull deteriorates a little in the course of time, but, independent of that, the deterioration of the hull, why I wouldn't, if I was asked to figure on putting that superstructure on the same as originally, I wouldn't undertake to do it for less than that amount of money.

Q. So what you mean is that for two thousand dol-

(Testimony of Thomas Hughes.)

lars you could put her in as good condition as originally constructed? A. No, sir.

Q. Except the hull?

A. Except deterioration to the hull; yes.

Q. Do you know about how many years ago it was built?

A. Well, it was only built a short time before it went down to Pearl Harbor.

Q. For whom did you build it?

A. For Mr. Almy.

Q. The gentleman sitting here? A. Yes.

Q. It was paid for by him, was it?

A. Yes, sir.

That is all.

H. N. ALMY, called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. Mr. Almy, do you know the house-boat involved in this controversy? A. I do.

Q. When was that house-boat built?

A. She was built in the middle of July, 1902.

Q. What was the cost of building that house-boat?

A. The boat as built before she went to Pearl Harbor cost something over twenty-two hundred dollars, twenty-two hundred and fifty dollars, and the fitting her up for Cotton Brothers work before being towed down there, putting in bunks and everything, for the forty

(Testimony of H. N. Almy.)

men, and other incidentals, cost a little less than three hundred dollars, a total cost of work, fitted up for their work before taking to Pearl Harbor from Honolulu was twenty-five hundred and fifty dollars, about, within a few dollars.

No cross-examination.

(The trial of the cause was here continued, being again taken up on Monday, the 23d day of May, 1904.)

Monday, May 23d, 1904.

Morning Session.

Mr. ALLAN DUNN, recalled.

Direct Examination.

(By Mr. DUNNE.)

Q. I will ask you, Mr. Dunn, if you were ever on board the house-boat involved in this case? A. I was.

Q. I will ask you if you know whether there were air courses in that house-boat?

A. You mean below the superstructure?

Q. Below the superstructure? A. There were.

Q. Where were those air courses?

A. Immediately below that platform on that model (pointing to the model in the courtroom).

Q. In here. (Referring to model.)

A. Running in there.

Q. How far did they extend athwart-ships, crosswise, if you know?

(Testimony of Allan Dunn.)

A. I couldn't say exactly how far they went. As far as I recollect they went nearly across.

Q. Do you know what their width was?

A. Two or three inches, I should say.

Q. Were there any bitts on the scow of this house-boat? A. Four bitts.

Q. How were they situated?

A. One on each corner.

Q. On each of the four corners? A. Yes, sir.

That is all.

The COURT.—Mr. Dunn, I don't understand these air courses you speak of.

A. Why, your Honor, between the scow proper and the platform of which the superstructure is situated there was a space in which the fore and aft part of the scow did not come immediately up to the platform but left a space running through the length through which air could pass and of course through which water might pass, as far as that goes.

The COURT.—That was open to the outside?

A. That was open to the outside, yes.

Cross-examination.

(By Mr. BRECKONS.)

Q. How many times have you seen that house-boat?

A. Seen it?

Q. Yes, been on it?

A. I was on it the whole of one day—about four times, I think, altogether.

That is all.

C. NIELSEN, called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. What initials have you? A. C. Nielsen.

Q. What is your occupation?

A. I have been on the sea all my lifetime.

Q. How old a man are you, Captain? A. Sir?

Q. How old are you? A. I am fifty-six.

Q. I will ask you if you are a certificated officer?

A. Yes.

Q. In what class of vessels? A. Steamers.

Q. Have you your certificate with you?

A. No, sir.

Q. Is your certificate still in force? A. Yes, sir.

Q. From the inspectors of what district did you receive your certificate?

A. Right here in Honolulu.

Q. Have you had any experience as a tow-boat man?

A. Yes, off and on.

Q. I will ask you if you know the steam tug "Kaena"

A. Yes, sir; I know her well.

Q. Did you have any experience in her?

A. For six years, more or less; I was the master of her for six years.

Q. You were the master of her for six years?

A. Yes.

Q. Have you had any experience in tow-boating in other vessels than the "Kaena"?

(Testimony of C. Nielsen.)

A. I have towed vessels with the steamer "Cummins" when I was master of her.

Q. How many years of your nautical experience have you been engaged in steam vessels, Captain?

A. Sir?

Q. (Question repeated.)

A. Well, I was master of the "Kaena" six years and the "Cummins" over ten years; and every now and then I did some towing. It was not a regular tow-boat but we did considerable towing at times.

Q. I was going to ask you, Captain, for your opinion on a state of facts which I will try to state to you. I want you to assume that a tow-boat, the "Kaena," starts from Pearl Harbor for Honolulu to tow up three vessels. One of these vessels is a house-boat, the other two vessels are laden scows. When the tow is made up, the house-boat is placed between the tug and the two scows in tandem—and I ask you if, in your opinion, that tow was properly, seemingly made up, assuming those to be the facts?

A. Well, those scows, how big were they? Were they as big and heavy as the house-boat?

Q. I will assume that they are at least as large as the house-boat.

Mr. BRECKONS.—This is now objected to, if your Honor please, because it is based on a state of facts not established by the evidence.

Mr. DUNNE.—I will withdraw that for a moment, Captain. Will you step down, please?

Mr. FREDERICK ROUSE, being first duly sworn on behalf of the libelant, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. What is your occupation, Captain?

A. Master mariner.

Q. How long have you been going to sea?

A. About twenty-eight years.

Q. Where did you go to sea, Captain?

A. I began at St. Johns, New Brunswick.

Q. Have you ever sailed in the United States Navy?

A. Yes, I have, through the Spanish-American war.

Q. With what record? A. Lieutenant.

Q. I will ask you if you are a certificated master in steamers? A. Yes, sir.

Q. And is your certificate in force at present?

A. Yes, sir.

Q. Have you had any experience in tow-boating?

A. About three years.

Q. Where?

A. Out of Boston, New York, Galveston and New Orleans.

Q. Now, I will ask you if you know the house-boat involved in this case? Have you seen the house-boat?

A. Oh, yes.

Q. Do you know the scows that were used down there at the dredging station at Pearl Harbor, the Cotton Brothers' scows?

A. Yes, I have seen them quite often.

(Testimony of Frederick Rouse.)

Q. I will ask you now to state from your knowledge of those scows—Oh, by the way, did you see the “Kaena” on the night she came in from the accident?

A. No, I didn't.

Q. On the morning following this accident did you see the scows or the house-boat anywhere?

A. Yes, I saw the house-boat lying alongside the Bishop Wharf.

Q. And the other two scows, where did you see them?

A. They were lying in the slip.

Q. Now, I will ask you to state the relative sizes—how those two scows compared in size with the scow of the house-boat?

A. About twice the size, I should judge.

Q. A good deal larger? A. A good deal larger.

Cross-examination.

(By Mr. BRECKONS.)

Q. Captain, when did you see the scows?

A. Lying alongside the Bishop Wharf the morning after they came in.

Q. When did they come in?

A. That I cannot positively say. I didn't take note of the date. It was last summer sometime.

Q. And you saw them when they were tied up there?

A. The morning after they came in.

Q. How do you know it was the morning after they came in?

A. Because I was stationed on the quarantine dock.

(Testimony of Frederick Rouse.)

Q. Did you see them come in?

A. No; they came before I got there in the morning.

Q. These scows are the ones you referred to in comparing them with the house-boat? A. Yes, sir.

That is all.

Captain C. NIELSEN, recalled.

Direct Examination (Continued).

(By Mr. DUNNE.)

Q. Now, Captain, I want you to assume that the scows which were towed behind the house-boat were at least the same size as the scow of the house-boat, and, assuming that fact, I say will you give your reasons why you say that it was not properly made up?

Mr. BRECKONS.—He has not said it was improperly made up. You asked the opinion of him whether it was a proper tow.

Mr. DUNNE.—Now, Captain, assuming the tow was made up as I have described—say the tug comes first, then comes the house-boat, and then comes these two scows; and I ask you to assume also that, so far as the relative sizes of the scows are concerned, the two scows in the rear of the house-boat are at least as large as the scow of the house-boat. I ask you, then, whether, in your opinion, that tow was properly made up?

A. Well, if I had towed the three up I should have placed the strongest first and the weakest last. I would have put the strongest next to the steamer and

(Testimony of C. Nielsen.)

the next strongest behind that, and the weakest craft of all at the other end—the strongest in front.

Q. What would be the reason, Captain, for doing that?

A. Because the first one, the next one to the tug, will have all the strain on it at both ends, and the second one will have less and the last one would have only its own pull. By putting the weakest close to the steamer you would have all the pressure on it amidships. It is liable to strain it.

Q. What would be the effect of this double drag, the drag one way by the tug and the drag the other way by the scows behind? What effect would that have upon the timbers, say?

A. Well, strain them all over. It would put a heavy strain on them. There would be a pull on each end, a heavy pull on this and a heavy pull on that. If I was to tow two vessels, I should put the largest vessel in front and the smallest behind.

Q. Then the rule is to put the weakest part of the tow at the far end?

A. The lightest tow at the far end. That is what I would do.

Q. Now, you have been to Pearl Harbor, have you, Captain?

A. Yes, lots of times.

Q. When you are coming from Pearl Harbor to Honolulu and the northeast trades are blowing, is that a head wind or a fair wind?

A. That is more of a head wind, almost dead ahead.

(Testimony of C. Nielsen.)

Q. Now, assuming that there was a breeze blowing, northeast trade wind blowing, we will call it a good breeze, I would like to know whether the effect of the wind—in the first place, would a breeze like that make any seas?

A. It would be liable to make a swell in the sea.

Q. Now, what would be the effect of the wind and the sea upon a house-boat placed in the position that I have described with reference to this matter of strain? Would it increase it or diminish that strain?

A. It would increase the strain. When you have a heavy swell there is more strain. In a dead calm the strain would be less.

Q. Is there any part of the twenty-four hours when the sea between Pearl Harbor and Honolulu is smoother and calmer than at other times?

A. I have always found it calmer early in the morning, at possibly nine and ten o'clock.

Q. What has been your experience as to the afternoon?

A. Well, when the trade winds settle down steady, it always blows pretty strong in the afternoon until about sundown; that is when the trades once set in. In southerly weather it is different.

Q. Now, I will ask you, Captain, what is the purpose of putting a rudder on a vessel?

A. To guide her, to keep her straight.

Q. Now, if a vessel has no rudder, what is described among seamen by the term "yawing"?

(Testimony of C. Nielsen.)

A. That is yawing backward and forward, where you have a vessel on and where you have no rudder, and she yaws one way and the other way, and every time she goes off one way or the other you put a big strain on the tow. Where you have a rudder you can keep right straight behind the tow-boat.

Q. Now, if a vessel is being towed, and she has no rudder, would her own movement, in consequence of the absence of a rudder, have any effect upon a strain that she was subjected to?

A. Didn't I say so just now?

The COURT.—Please answer that directly.

A. Well, a vessel without a rudder, unless very smooth, and the third tow, it is almost impossible to keep them straight. They will sheer off one way and then the other, and you can never keep her straight for any length of time, and every time it puts a much bigger strain on the hawser and vessels towed. Whereas if she has a rudder she goes along steady and less strain and everything on both hawser and vessel. That is as near as I can explain it.

Q. I will ask you to describe, Captain, what the effect would be if in any way water made its entrance into the scow of the house-boat? What would the effect of the presence of that water in the scow of the house-boat be, she being towed under those conditions?

A. It wouldn't improve her any. The sooner you would pump it out the better.

(Testimony of C. Nielsen.)

A. Suppose there was no pump and this water got into that scow, how would it act?

A. It would act this way: That, as she starts to roll, as she would be bound to do more or less, she would roll more than without any water in it.

Q. Now, assuming, Captain, that there was an air-course running athwart-ships on the scow, for ventilation purposes, and that it was from two to three inches in the opening, I ask you if it would have been a wise precaution, a piece of careful seamanship, in proceeding to tow such a house-boat from Pearl Harbor to Honolulu, in the afternoon, to close up those air-courses?

Mr. BRECKONS.—We object to the question, if your Honor please, first as leading, second as not bearing on the issues in this case. The libelant in the case itself has undertaken to set forth the particular negligence complained of, but has not mentioned this one as being in the issues.

The COURT.—I will allow the question if it is put in a form that it not leading.

Mr. DUNNE.—I will ask you if, in your opinion as a nautical man, it would be a careful manner and method to operate the removal of such a house-boat if the air-courses were closed up?

A. I don't think it would be a very hard matter to close them up. It would certainly be much safer. It would not take long to put a batten over them. It is always better to be on the safe side.

(Testimony of C. Nielsen.)

Q. Now, I will ask you to state, in your opinion, whether it would be a careful thing to do, nautically speaking, to tow the house-boat up alone without any scows behind it?

A. If I had anything to do with it I should prefer to tow the boat all alone by itself.

Q. What are your reasons for that, Captain?

A. It would be safer all over. I would only have one rope to take care of, and I could guide the steamer, and whenever a sea and swell would strike it I could slow down and handle it better.

Cross-examination.

(By Mr. JUDD.)

Q. Would you qualify that answer at all, Captain, if the house-boat had any rudder?

A. Under any circumstances I would rather have her all by herself rather than with two or three other vessels.

That is all, Captain.

Captain FREDERICK ROUSE, recalled on behalf of the libelant.

Direct Examination.

(By Mr. DUNNE.)

Q. Captain, are you in any official position here in Honolulu?

A. I am with the quarantine people, yes, the United States Marine Hospital.

(Testimony of Frederick Rouse.)

Q. Now, I will ask you for your opinion as to the making up of a tow which I will assume to have been made up in the following manner: First comes the tug, then comes a house-boat, then come, all in tandem, two laden scows; the tow being from Pearl Harbor to Honolulu harbor, in the afternoon, when the northeast trades are blowing, a fair breeze. I ask you whether, in your opinion, such a tow was properly, seemingly, made up?

A. No; I should think not.

Q. Why not, Captain?

A. Well, because generally they always put the weaker vessel on the far end.

Q. What is the reason why the weaker vessel should be placed at the far end?

A. Because there is less strain and she is more protected by the tow ahead of her.

Q. You say there would be less strain. Where would that strain come from, where would it be, if the weaker vessel were put in between?

A. Well, there would be a strain all over.

Q. Where would the strain come from?

A. Well, I should think all over the vessel, because there is a constant pull on both ends.

Q. You have, I suppose, visited Pearl Harbor?

A. Not by water. I have been down by land.

Q. You have seen the house-boat involved in this case?

A. Yes, sir.

Q. Did that house-boat have a rudder?

(Testimony of Frederick Rouse.)

A. Well, I don't think it did; at least I never saw it.

Q. These scows that I have referred to, have they rudders? A. No, I don't think so.

Cross-examination.

(By Mr. BRECKONS.)

Q. What has been your experience in the towing business, Captain?

A. Well, I was three years tow-boating in and out of Boston, Galveston, New York and New Orleans.

Q. How long ago? A. 1894.

Q. What business have you been in since then?

A. Following the sea.

Q. Have you been in the tow-boat business since then? A. Once, yes.

Q. How long? A. Six months.

Q. Where? A. That was in 1894.

Q. Since that time you have not followed it in any way? A. Not the tow-boat business, no.

Q. You are not acquainted with the sea trip between Pearl Harbor and Honolulu? A. No, I am not.

Q. In what capacity are you now employed by the Marine Hospital Service?

A. I am in charge of the quarantine launch.

Q. (To the Stenographer.) Mr. Stenographer, will you turn to Mr. Dunne's question, in which the opinion of the witness is asked as to the making up of the tow?

The STENOGRAPHER.—(Reading:) "Q. Now, I will ask you for your opinion as to the making up of a tow

(Testimony of Frederick Rouse.)

which I will assume to have been made up in the following manner: First comes the tug, then comes a house-boat, then come, all in tandem, two laden scows; the tow being from Pearl Harbor to Honolulu harbor in the afternoon, when the northeast trades were blowing, a fair breeze. I ask you whether, in your opinion, such a tow was properly, seemingly, made up?"

Mr. BRECKONS.—Q. (To the Witness.) Your answer to that was you did not think so, because the weaker vessel should have been put last?

A. Yes, sir.

Q. Now, Captain, why did you say that, when there is nothing in the question as to which was the weaker vessel?

A. Well, my opinion of the scows I seen, the scows, the three scows.

Q. They were the same scows you saw?

A. Sand and freight scows.

Q. So your opinion as to whether that tow was made up in a seamanlike manner is based on the presumption that the scows which you saw were the scows in the tow? A. What I know of the scows, yes.

Q. And the ones which you saw and which you assume were part of the tow were the sand scows, were they? A. I should say yes.

Q. Several times larger and heavier than the house-boat? A. Yes.

Q. And out of all proportion to the house-boat in weight and size? A. Yes, sir.

(Testimony of Frederick Rouse.)

Q. How many times have you seen them?

A. I could not say, I am sure.

That is all.

Redirect Examination.

(By Mr. DUNNE.)

Q. Those scows that you have described, are they decked? A. I think so; I wouldn't be sure.

Q. When you saw them the next morning what, if anything, did you see on them?

A. They were full of machinery, pipes and things like that.

Q. Did you notice any chains or anchors on them?

A. I didn't take notice of them if they were.

Q. You did see them loaded up with machinery and pipes?

A. Yes, with pipes and machinery and one thing and another.

Recross-examination.

(By Mr. JUDD.)

Q. Did you note what kind of machinery that was?

A. I noticed particularly there were a lot of pipes; that is about all I noticed.

Q. Have you any idea what kind of pipe?

A. Suction pipe, for running water through.

Q. Twenty or twenty-four inch?

A. I suppose twenty or twenty-four inch pipe.

That is all.

(Libelants here rested their main case.)

JOHN SCOTT, sworn on behalf of libelees, testified as follows:

Direct Examination.

(By Mr. JUDD.)

Q. How old are you, Mr. Scott?

A. Forty-nine in November.

Q. You are a sea-faring man?

A. For thirty years.

Q. Are you a certificated officer? A. Yes, sir.

Q. In steam? A. In steam, yes, sir.

Q. Registered in what district?

A. San Francisco, California.

Q. In August last, August, 1903, by whom were you employed? A. Cotton Brothers.

Q. Employed by them in what capacity?

A. In the capacity of master of the steamer "Kaena."

Q. Do you remember—state whether or not you remember what the steamer "Kaena" was doing on the 4th day of August, last year? In the first place, where was the "Kaena" on that day?

A. The "Kaena," I had charge of her all night the night of the third, towing sand scows from Pearl Harbor to Honolulu. I was relieved at seven o'clock in the morning.

Q. Of what day?

A. Of the fourth. I was relieved at seven o'clock. The day captain's watch came on then.

Q. In the afternoon of the fourth of August what was the tug doing?

(Answer inaudible.)

(Testimony of John Scott.)

Q. Speak up louder. I will remodel the question. Do you remember what the tug was doing on the third of August?

A. She was towing scows of different sizes up here to Honolulu with material left over from the work there on the third.

Q. On the fourth of August what was she doing?

A. On the fourth of August I was relieved at seven o'clock in the morning and the tug was in charge of Captain Doran, the day captain. He brought up the scow billy which was used for carrying up and down coal used in the work. He returned from Honolulu to Pearl Harbor at half-past one on the fourth. I had been asleep that morning, as I had been up the night before sending scows to Honolulu. He came to me and reported, "Captain, I have orders to bring up the house-boat if the weather permits." I said, "How is the weather outside?" He said, "Smooth, nice; there is no wind inside." He said if the water was smooth he would bring up the house-boat and these two scows behind and clean up the whole job.

Q. Up to that time, Captain, that is at half-past one on the day of the fourth of August, what scows were there at Pearl Harbor belonging to Cotton Brothers?

A. There was a small water scow, a small anchor scow and one skiff, beside the house-boat.

Q. Were there any sand scows remaining?

A. No, sir; I towed them up the night before.

Q. Did you see how the tow was constructed?

(Testimony of John Scott.)

A. Yes, sir.

Q. State whether or not those scows which you have just mentioned were in that tow?

A. They were in the tow; yes, sir.

Q. Do you remember the dimensions of the water scow, the anchor scow and the house-boat?

A. Pretty near. The house-boat it was fifty feet by twenty, the hull; three feet deep. When the top hamper was on she drew thirteen inches of water.

The COURT.—Q. What are those dimensions you are giving, the water line or the deck?

Mr. JUDD.—Approximately the size of the scows.

Q. In describing the house-boat, giving these dimensions, do you mean the deck or water line?

A. The top side of the hull of the scow.

Q. The deck of the hull?

A. The hull, not the platform; the top of the hull.

Q. What followed the house-boat in the tow?

A. Well, the scow that was called the water scow.

Q. Was there any water in it?

A. We were not carrying water up here.

Q. Can you state the dimensions of the hull of the water scow?

A. Yes, sir; twenty-seven feet long, ten feet wide, three feet deep; the top of it the same as that desk (pointing to the clerk's desk); a square box as it were.

Q. Will you state—when the tow left Pearl Harbor with what, if anything, was that scow loaded?

(Testimony of John Scott.)

A. It was not loaded. There was nothing to put on it. It was the same as the top of that desk.

Q. At that time what was she drawing?

A. About six or seven inches.

Q. What boat in the tow followed the water scow?

A. A small anchor scow, for picking up light anchors.

Q. Will you please state, if you can, what the dimensions of the hull of that scow were?

A. Yes, sir; that anchor scow was about twenty-two feet long; nine feet, six inches beam, and it was two and one-half feet deep from the rail down to the bottom. She drew about five inches of water, five, six or seven; with a little water in her she might draw seven.

Q. At the time the tow was made up with what was she loaded?

A. Nothing but a winch, a little derrick for picking up small anchors.

Q. You state that the tow was made up with the house-boat first, the water scow next and the anchor scow followed that.

Q. Was there any other vessel or boat?

A. A small skiff, a skiff that two men could pick up on the shore; a small skiff belonging to one of the natives.

Q. Will you kindly state how that tow was made up with reference to the cables that were used?

A. Well, the cable used—we had one hawser which is

(Testimony of John Scott.)

a six inch tow-line. That was about twenty-seven fathoms. It had been thirty fathoms and we cut off three; about twenty-seven fathoms long. On the house-boat there are two bits or posts and on these posts around the bottom was a chain bridle in a V-shape, with a large link or shackle in that bridle for towing purposes. My hawser was made fast to that chain bridle.

Q. Was that chain bridle part of the house-boat or part of the scow?

A. That chain bridle belonged to the house-boat. It was there when she was taken to Pearl Harbor and it is there yet.

Q. And how large were the cables from the house-boat to the scows following?

A. Small lines made fast to the water scow, two or three inch. As a matter of fact, the wind has an effect on a big house like that and in order to steer that house-boat I put this small water scow and anchor scow behind it, in order to steer it.

Q. When did you say the "Kaena" left Pearl Harbor with the tow?

A. Left Pearl Harbor, as near as I can remember, about half-past two.

Q. At that time what was the condition of the wind?

A. The wind was very light, northeast, nor'-nor' east.

Q. When you got outside the harbor did the wind remain the same, or was there a change?

A. No; the wind was in the same direction. I think

(Testimony of John Scott.)

it was going along all right. I was laying on deck on a mattress.

Q. The deck of what boat?

A. The "Kaena," when the day captain was in charge. I came on duty at six o'clock again.

Q. What is his name?

A. Doran. At 4:55 I wasn't asleep. I was tired, that was all. I lay on deck. Mr. Wheeler was the engineer in charge at the time. He sat in the door of the engine-room watching the tow. Suddenly he said, "Look at the house-boat." She got capsized, overturned from seaward and as soon as she turned a little the stove and bureau they ran down the leeward side and over she went. The top side of that house went over to the water's edge. She was three-corner ways up from the water. I jumped on my feet and said, "Stop her."

Q. Whereabouts, Captain, on the trip up did this happen?

A. Right abreast of Kalihi reef.

Q. What was the condition of the water at that time?

A. The water was pretty smooth. There was no sea at all. In fact on that apron there there were two Chinese or Japanese laying there all the time. If there had been any sea they could not have stayed there; they would have been washed off; they would have got wet.

Q. After you took charge of the "Kaena," after you saw there was trouble, what did you do?

A. As soon as I stopped the boat I immediately backed down and got the crew to haul in the tow-line.

(Testimony of John Scott.)

The Chinese crew and waiter were asleep. Their room was on the side that went down. There were three white carpenters on board the boat. I called out to save everybody there. Certainly, I didn't want to see any life lost. I wanted to get the lives out and sung out, "Is everybody all right?" and they said, "Yes." They were taking the bedding and mattresses and throwing them on these small scows behind the house-boat. They got everything out they could save. Well, I consulted with the mate and chief engineer. We said very well, we will try and see if we can get up to Honolulu as it is. We started to tow very slowly again and started to tow to Honolulu. Well, I found out I could make no headway; I couldn't move that house-boat in the condition it was in; the more I towed the more I pulled the house off. I took my lead line and sounded over the side to see what water I had. I could get no bottom at thirty fathoms and I headed right in for the beach, headed until we got soundings, headed right in to the entrance of Kalihi channel. I got in until I got fifteen fathoms of water. It was getting dark. "Well," I said, "I can't stay here all night with this thing and the people on those scows. I must get to Honolulu in some way"; so I did the best I could. I made an anchor fast to the tow-line and when I got into fifteen fathoms I dropped the anchor overboard and anchored there. I picked up the anchor scow and water scow and skiff and towed into Honolulu.

Q. At that time, Captain, what were those two scows loaded with? A. Nothing.

(Testimony of John Scott.)

Q. After leaving the house-boat?

A. Oh, trunks, bedding, clothing, or anything they saved out of the house-boat.

Q. Then what did you do?

A. I brought the people and the two little scows to Honolulu, to Bishop slip. I immediately went up to Mr. Agassiz's house, who was the manager in Honolulu. I proceeded to his house and reported the matter to him. He says it is too bad.

Q. Then what did you do, Captain?

A. I waited for his orders. I said what can I do. He says, "Is she anchored in a safe place?" I said "Yes." Then, "John," he says, "have you got your crew there? I suggest you go right back, get the boat out and get what you can of that house-boat in. I suppose before this the house will be gone off." I expected that myself; but I went back; I left Honolulu at eleven o'clock at night; I went down to Kalihi, got off there about ten minutes past twelve on the morning of the 5th. The boat was still there, but part of the house it had worked and worked until it collapsed. The house was built the same as you would build a house on that desk. It wouldn't take a lot of surging to surge that top from it. The house was gone. The cooking-stove remained on one side; a big cooking-stove and a big bureau, they stayed, and one big ice-box stayed. The cooking utensils there and part of the side of the house fell in. The lee side was broken and gone. Therefore, the weather side was resting on top.

(Testimony of John Scott.)

Q. And that was its condition, then, at midnight when you got down there? A. Yes.

Q. Then what did you do with reference to the house-boat?

A. I immediately put a hook-line on the tow-line and backed right up to her and put this big hook under the tow-line and ran that line until I got the anchor and then went right along to Honolulu, and it took nearly three hours to get to Honolulu from there. I was not more than two miles from the mouth of Honolulu Harbor, so you can imagine the condition it was in.

Q. When you reached Honolulu with that tow where did you place the house-boat?

A. Alongside Bishop slip. I placed a watchman in charge of her until morning. I was tired out and went home. I left the watchman to take care of her until morning, so that nothing that was there could be walked off with.

Q. How long were you familiar with the house-boat previous to the day of the accident? How long had you seen the boat?

A. I had seen her pretty nearly since she was built.

Q. Could you give approximately how long it was?

A. I couldn't tell. I towed her to Pearl Harbor and lived aboard her all the time down there.

Q. Are you familiar with the way that hull was constructed? Did you ever examine the hull?

A. Never very thoroughly.

Q. After the accident did you examine the hull?

(Testimony of John Scott.)

A. After the accident I naturally went aboard to see how that top house was fastened.

Q. What did you see?

A. I saw the way the hull was; it was just the same as you would build that desk. The hull is there to be seen by anybody in the city of Honolulu who wants to see it now.

Q. Was it or wasn't that house-boat constructed with air courses in the hull?

A. Not that I am aware of. I never saw any.

Q. You saw none after the accident when you made that examination you have testified to?

A. I saw none. There are little ports inside around the deck, out towards the sides of her.

Q. Do you remember, Captain, when you towed the house-boat to Pearl Harbor? A. Yes, sir.

Q. From whom did you receive her on that day?

A. From here?

Q. Yes; when she was in the harbor who turned her over to you?

Mr. DUNNE.—We object as immaterial. What is the object, Mr. Judd?

Mr. BRECKONS.—The object will be to show she was delivered to the libelees in this action by Mr. Almy, as one of the links in the evidence showing his agency for the owner.

(Discussion.)

(Last question withdrawn.)

(Testimony of John Scott.)

Q. The question being withdrawn, Captain, I will ask you what experience you have had in the towing business?

A. Well, I have been off and on tow-boating in Philadelphia. I was raised in a tow-boat, from twelve to seventeen; I was on nothing but tow-boats as a boy; from then on; I came to California; I came out in the "Alameda"; I tow-boated in the bay of San Francisco until four years ago on Spreckels tow-boat there.

Q. From your experience as a tow-boat man, were the conditions of wind and water such as make it safe to start from Pearl Harbor with that tow?

A. Perfectly safe.

Q. At that time? A. Yes, sir.

Q. From your experience as a tow-boat man and your knowledge of the facts at that time was that tow properly constructed? A. Yes, sir.

Cross-examination.

(By Mr. DUNNE.)

Q. Captain, you said the orders were to tow up the house-boat if the weather permitted, and to tow the two little scows behind us so as to clear up the whole job; that is correct, is it? A. Correct.

Q. In other words, Cotton Brothers had a dredging contract, didn't they, down there?

A. I believe so.

Q. And that contract was just about finished?

A. The contract was finished.

(Testimony of John Scott.)

Q. And during the 3d of August you had been *on* duty with the tow-boat bringing up on the scows the material left over from that job?

A. No, sir; I didn't, but the day captain had on the 3d day of August.

Q. I mean the tug, whoever was in charge?

A. Yes, sir.

Q. And at this time there was really nothing left there except the house-boat and these two scows and the idea was to bring them all up at once and clean up the job; is that correct? A. No, sir; it ain't.

Q. I say this, the tow-boat having been busy the evening of August 3d towing up scows with the remaining material, wasn't the idea this: that the house-boat and these two little scows should all be towed up at once to clear up the whole job? Isn't that correct?

A. That is correct; that was on the day of the 4th, sir.

Q. Now, what time was it when the tow started?

A. About half-past two, twenty minutes past two, in the afternoon.

Q. And what time was it when you reached the entrance to Pearl Harbor?

A. I don't know, sir; I didn't take time.

Q. What time was it when you reached the place where the accident occurred?

A. Four forty-five P. M.

Q. How far, towing distance, was the place where

(Testimony of John Scott.)

the accident occurred from the place where the tow started?

A. Five and one-half miles to six. I could not be sure of the exact distance.

Q. And how far was the place where the accident occurred from Honolulu?

A. A mile and a half to two miles.

Q. Is the "Kaena" a low power or a high power boat?

A. She is a kind of single engine affair.

Q. Do you know what horse-power she is?

A. I do not. I am not an engineer; I never seen a card taken off her.

Q. What force, what employees, were on the "Kaena" belonging to Cotton Brothers proper?

A. What is that?

Q. What crew did the "Kaena" carry?

A. Two crews; ten people all told.

Q. A day crew and a night crew?

A. Yes, sir; and we were all aboard at that time.

Q. The day crew had five men and the night crew had five and that is all; so that five people were in each crew?

A. Yes, sir.

Q. That is to say, a master, a mate, a—

A. (Int.) No, there is two masters.

Q. How many mates? A. No mates.

Q. How many engineers, Captain?

A. Two engineers.

Q. How many firemen? A. Two firemen.

Q. How many deck hands?

(Testimony of John Scott.)

A. Four deck hands.

Q. Captain, you said something about putting the scows behind the house-boat to act as rudders for the house-boat? A. Yes, sir.

Q. Then the house-boat didn't have a rudder?

A. No, sir.

Q. Did these scows have rudders, Captain?

A. No, sir.

Q. Now, were any of Cotton Brothers employees on board the house-boat? A. Yes, sir.

Q. These men at the time of the accident were taken off by you, were they? A. No, sir.

Q. How were they taken off?

A. Those scows behind the house-boat naturally, when we came up after them, and these people got off the house-boat and stepped on the scow. I didn't take them off.

Q. That is the way. The fact is they left the house-boat?

A. They didn't stay in the house-boat any more after she capsized, as it were.

Q. How many of these men were there?

A. Two or three carpenters, and one machinist, two Chinamen, or three; I think two Japanese were aboard her, a Japanese woman or two.

Q. That is three white men, two Chinese and two Japanese? A. I think a Japanese woman or two.

Q. Seven or eight people? A. Yes, sir.

Q. I will ask you if there was anybody aboard the

(Testimony of John Scott.)

“Kaena,” that house-boat, or aboard the scows at any time during this transaction except employees of Cotton Brothers? A. No, sir.

Q. Now, Captain, you said that Mr. Wheeler called you to see the house-boat. You were lying down at the time and the word you used was “capsized.”

A. No, I didn't see it; I believe Wheeler called me. He drew my attention to it.

Q. Captain, what made that boat capsize? Why did she capsize?

A. Simply because she had been laying there so long her seams opened up by towing her.

Q. Laying where?

A. At Puuloa. One end was on the beach. The end I towed had a chain bridle attached to it with two bitts and that end was afloat. The other end was on the beach. I towed her off and made those small stakes fast.

Q. I exhibit to you a small photograph and ask if that represents the position of that house-boat beached? A. Yes, sir; it does. Correct.

Mr. DUNNE.—This will be Libelant's Exhibit No. 2. We offer in evidence this photograph.

Q. How long, Captain, did you observe that house-boat with one end ashore, beached as you call it?

A. For at least six months.

Q. That is to say six months just prior to the time you towed her up? A. Yes.

(Testimony of John Scott.)

Q. Now, suppose, Captain, that she had been towed up alone, without anything pulling behind her, quietly, carefully, at a slow rate of speed, a time selected when the wind and sea would be especially favorable—suppose all those precautions had been taken, don't you think she might have reached Honolulu uninjured?

A. No more than the way she was towed. The weather was fine and everything on the way down. I was laying on the deck on a mattress and there was no sea. Her seams opened up from naturally laying too long on the beach and the people aboard didn't know she was foul at all. The stove wasn't fast, the bureau wasn't fast. They slid over.

Q. Now, Captain, how much free-board was there on the hull of the scow proper?

A. About seventeen inches, or eighteen inches. She drew thirteen inches.

Q. So that the top of her free-board above the surface of the water would be about five inches?

A. Oh, no, no.

Q. What was the total amount of free-board?

A. You mean to say above the water's edge? The hull from the topside down to the bottom was three feet.

Q. I don't mean the amount of free-board from the top of this platform at all, but I mean here (illustrating on the model). What would be the planking there?

A. She drew thirteen inches of water. Now, take thirteen inches from three feet.

(Testimony of John Scott.)

Q. So that thirteen inches from thirty-six inches would leave twenty-three inches? A. Yes, sir.

Q. Now, Captain, do you mean that while this boat was being towed along from Pearl Harbor to Honolulu that she was absolutely stationary so far as up and down movement was concerned?

A. I didn't mean to say anything of the kind.

Q. There was more or less dip to the scow, wasn't there? A. Yes, sir.

Q. Was there dip enough to bring the under side of this platform to the water's edge?

A. No, sir; not enough.

Q. Not enough for that? A. No, sir.

Q. The fact that this house-boat was ashore for the greater part of this six months was a fact generally known, wasn't it, to everybody down there who lived on board the house-boat, the fact that there was one end on the shore?

A. One end was on the beach all the time.

Q. And there was a plank from the platform to the land? A. Exactly.

Q. When you commenced to tow up you pulled her off the shore, did you? A. Yes, sir.

That is all.

The COURT.—I understand you to say that one end was on the botton during this six months?

A. Well, your Honor, I couldn't state the exact time; it would be about six months.

(Testimony of John Scott.)

Q. So when the tide flowed the other end would dip some?

A. There was so little tide one end was always afloat entirely and the other end on the beach it was almost afloat and the tide had no effect on her at all.

Q. So a good part of her bottom was resting on the sand beach? A. On the sand beach; yes, sir.

The COURT (To Counsel).—There is another matter of information; I don't know whether to ask it. A good deal of questioning has been done as to whether it was a safe thing to tow this vessel up at the kind of weather existing at that time. I should like to have this witness asked whether it was safe to take a house-boat of that kind out in the open sea when there was any swell, referring to the fact of the house-boat being built on a deck without being built into the deck.

Mr. DUNNE.—Q. Would it be a safe thing to tow a house-boat like this, under these conditions, having reference to a heavy swell?

A. No; I wouldn't have undertaken to tow her in a swell. The water was perfectly smooth. Mr. Agassiz says if the weather permits bring up the house-boat. I wouldn't have brought her up at all if the weather was not perfect. The weather was fine.

Q. Wasn't even a swell?

A. Certainly not.

The COURT.—Q. The whole accident was on account of the fact that her seams were opened and she leaked until she had enough water to lay her on the side?

(Testimony of John Scott.)

A. She went over very suddenly; so suddenly that the men hardly had time to get out of her. As soon as I heard the engineer say "Look at the house-boat," I sung out "Stop her."

Q. Do you know how much water there was in her at that time?

A. I had an idea that the hull of the thing was tight, because walking on the floor of that hull was like walking on the floor of this room, and the people aboard—there were three carpenters aboard, ship's carpenters—two carpenters and a mechanic—they were aboard and surely if water appeared they would have found it under their feet. The hull filled under the floor and she naturally went over as suddenly as that. I did all that man could do to save the thing. There was nothing to save only what I did save.

P. M. Session, May 23d, 1904.

Mr. BURT WHEELER, called on behalf of the libelles, being first duly sworn testified as follows:

Direct Examination.

(By Mr. JUDD.)

Q. Please state your full name, Mr. Wheeler.

A. Burt Wheeler.

Q. On the 4th of August last, August 4th, 1903, were you an engineer aboard the tug "Kaena"?

A. I was.

(Testimony of Burt Wheeler.)

Q. On the afternoon of that day what was the tug doing?

A. Making a tow from Pearl Harbor to Honolulu Harbor.

Q. Do you remember what time, approximately, it was that you left Pearl Harbor?

A. Well, a little—if my memory serves me right, a little bit after twelve; how much I don't know. After lunch we started to get the tow ready and probably it was two o'clock when we got away.

Q. How was that tow constructed? That is, what vessels were in the tow?

A. First came the tug, then the house-boat; after the house-boat was a water scow and then an anchor scow.

Q. Did they compose the tow?

A. Well, a small skiff I forgot to mention.

Q. And they were placed in that order?

A. That order.

Q. Let me ask you, what was the relative size of the water scow with reference to the house-boat?

A. Well, it was very much smaller. I never measured either one, but the water scow, I should say, was about twenty-four feet long and probably ten feet beam, and probably a depth of two feet.

Q. And the anchor scow?

A. Was smaller than the water scow.

Q. What about the skiff? What was the size of that?

A. An ordinary skiff, possibly sixteen feet long, eigh-

(Testimony of Burt Wheeler.)

teen maybe; I don't know exactly what size it was; a small skiff; one pair of oars.

Q. When you left Pearl Harbor, with what, if anything, were those scows laden?

A. They had nothing at all on them.

Q. Neither the water scow nor the anchor scow?

A. No, sir.

Q. At the time you left Pearl Harbor, state briefly the condition of the water and the weather.

A. Regarding waves and things?

Q. Yes. How was the water?

A. The water was smooth. Of course there was a small ocean swell, but the wind-waves were very light, very small wind-waves. Inside there was not any at all.

Q. And where was the wind from, what direction?

A. Northeast trade.

Q. What time was it, Mr. Wheeler, that you noticed, if you did notice, anything wrong in the tow?

A. It was shortly after four o'clock that I noticed it.

Q. Where were you at the time?

A. I was seated in the door of the engine-room and I looked back and saw the house-boat beginning to careen to one side and saw the house breaking away from the deck on the starboard forward corner by that first window there (pointing to model), calling this the starboard end, because the bridle is on this end of the boat.

Q. What do you mean by "breaking away"?

A. Breaking away from the hull, from the bottom of the vessel and was bending and swaying like that (ges-

(Testimony of Burt Wheeler.)

tiulating) with the motion of the waves; whenever she rolled that end (pointing to model) appeared and then would go down again.

Q. When you observe that what did you do?

A. I called the captain's attention to it, or the mate rather who was in charge at the time. I sung out to him; he was near, a short distance.

Q. And you returned to the engine-room?

A. Yes, sir.

Q. When you came up again on deck what did you see with reference to the house-boat?

A. Well, she had settled more to the port and the gap in the side was growing larger and further aft.

Q. What was being done to the house-boat?

A. Well, there was nothing being done, except people were taking out dunnage, bedding; stuff like that; whatever they could carry.

Q. And where was this bedding being put?

A. Onto the water scow, just astern.

Q. How long have you followed the sea, Mr. Wheeler?

A. Well, about twelve or fourteen years.

Q. And your present employment is what?

A. I am in the navy now.

Q. Have you during these twelve or fourteen years ever served in the towing business?

A. I served in the towing business in San Francisco and I came here as chief engineer of the steamer "Fearless."

(Testimony of Burt Wheeler.)

Q. The tug "Fearless"? A. Yes, sir.

Q. In your opinion as a tow-boat man, was that tow properly constructed?

A. I should say it was properly put together.

Q. In your experience as a tow-boat man, was it safe, taking the condition of the water and wind into consideration, to bring up the tow at that time?

A. I should say it was safe.

Q. By the way, how did you occupy yourself from the time the tow left Pearl Harbor until the accident happened?

A. Watching the engine and watching the tow. I mean by that that in towing it is an engineer's place to watch the line, to watch the tow-line as well as to look out for his engine, and I stood in the door of the engine-room where I could see the engine and also watch the tow.

Q. What was the condition of the tow on the way up?

A. It was all right until I noticed the accident. I don't know how long it might have been before I saw it, but up to that time it was coming along all right.

Cross-examination.

(By Mr. DUNNE.)

Q. Mr. Wheeler, do you know Mr. Allan Dunn?

A. Beg pardon?

Q. Do you know Mr. Allan Dunn?

A. Only by reputation.

(Testimony of Burt Wheeler.)

Q. Do you recognize him sitting here in the court-room?

A. Only just from having seen him on the street; that is all.

Q. Do you remember meeting him on a Rapid Transit car on the evening of August 6th or 7th, a night or two after the house-boat was lost? A. No, I don't.

Q. Do you remember being upon that car and he and a friend were sitting in the seat just in front of you and talking about the loss of the Almy house-boat?

A. No, I don't recall it. I was talking with several people about the wreck of the house-boat.

Q. I will ask you if on that occasion, while Mr. Dunn and his friend were talking about the loss of the Almy house-boat, you did not break into their conversation and ask if they were talking about Almy's house-boat, and then that you proceeded to say that they, meaning Cotton Brothers, had made a nice mess of it; that it was a bum job of towing to place the house-boat between the tug and the scows; and that you were not surprised that the house-boat was wrecked; that you were on the tug at the time; that the men who were on the house-boat told you they had been calling to the tug for fifteen minutes before anything was done towards helping them; and that the tug-men could not have been watching their tow; and that those on board the house-boat had been drinking whisky and were not watching the house-boat's condition, and that some of this whisky was saved?

(Testimony of Burt Wheeler.)

A. No, sir; I did not say anything of the kind.
That is all.

The COURT.—So far as you know, what was the cause of the disaster to the house-boat?

A. Well, as far as I know it was caused by being laid-up there on the—well, practically on the beach; at different stages of the water it would be afloat and then at one end, in-shore end, all on the beach. While lying there in still water, in my opinion she dried out above the water line and her seams opened up. Then the house was not properly fastened to the hull for another thing, and when she got out and got into the sea, the motion opened up the seams a little bit, and as she got more water into her, that motion became more aggravated, and when she commenced to rock and rocked the house loose from the hull, she carried away.

Captain WILLIAM OLSEN, called on behalf of the libelees, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. JUDD.)

Q. What is your full name, Captain?

A. William Olsen.

Q. You are a seafaring man, Captain? A. Yes.

Q. How long have you followed the sea?

A. Twenty-two years.

Q. Your present employment is what?

A. Master of the tug "Fearless."

(Testimony of Captain William Olsen.)

Q. How long have you been in the towing business?

A. Since 1889.

Q. Are you familiar with the tug "Kaena"?

A. Why, I have seen the boat.

Q. Are you more or less familiar with conditions of weather and water around Pearl Harbor, between here and Pearl Harbor?

A. Oh, yes.

Q. Suppose, Captain, that over that water, between Pearl Harbor and Honolulu, with the northwest trades blowing and with smooth water, the tug "Kaena" or a boat of her size should attempt to tow a house-boat fifty by twenty, being a double deck concern, and behind the house-boat should have attached a water scow twenty-seven by ten, and in the rear of that an anchor scow about twenty by ten, and a skiff behind that—would that construction of the tow be, in your opinion, a proper construction? A. It would.

Cross-examination.

(By Mr. DUNNE.)

Q. Captain, if that house-boat you speak of had been hung up on the beach for six months and you knew it; hung up on the beach so that when you wanted to go aboard and come off you walked up and down a plank that went from the platform rail down on to the solid earth, and that she appeared rotted out; seams opened up; when you commenced to tow her you had to pull her right off the land—do you think in a case like that

(Testimony of Captain William Olsen.)

that it would be careful, cautious, prudent seamanship to tow such a boat?

A. Well, a house-boat of that size, of that shape, erected as that is, only draws a few inches of water and they do not lay heavy on the sand.

Q. Well, you do not answer the question, Captain. Suppose the house-boat had been aground for six months, the tide ebbing and flowing under one end of it; the other end fast upon the beach, so that people who came on board of her and left her went up and down a plank that went from her platform to the land; suppose she had dried out; suppose that her seams had opened up—would you say that, under those conditions, it would be careful, cautious, prudent seamanship to attempt to tow such a vessel?

A. Well, if you towed her up carefully it could be done.

Q. How?

A. Drawing her carefully and slowly.

Q. And with anything behind her?

A. Yes; it would improve her.

Q. And you still think that with a boat whose seams had dried out, whose seams had opened up, you still think it would be a careful, cautious and prudent piece of seamanship to tow that boat?

A. I say it could be done by towing it up carefully, slowly.

Q. Yes, I know; but would it be careful, cautious and prudent seamanship to do it?

(Testimony of Captain William Olsen.)

A. I was not there and didn't see how much her seams were opened up and I don't know how long she was on the beach. I say it could be done by towing her up carefully.

Q. Now, I am telling you. You say you don't know—she was six months on the beach in Pearl Harbor, and, as one witness expresses it, her seams had dried out and opened. Now, under those conditions, with a boat like that practically a sieve, would it be proper to tow such a vessel as that?

Mr. BRECKONS.—I object to the question, if your Honor please. There is no evidence that the boat was practically a sieve.

Mr. DUNNE.—I withdraw that phrase. I tell you she was six months upon the shore; the testimony of the witness is she was six months upon the shore, and one witness swears here she had dried out and that her seams had opened up—

The COURT (Int.).—That, Mr. Dunne, means she was on the land, on the bottom solid on the bottom?

Mr. DUNNE.—Yes; and here was the tide under it; one end of the boat on the land and the other end in the water. Now, I ask you if you still insist it was careful, cautious and prudent seamanship to attempt to tow such a vessel as that, under those conditions?

A. I will give the same answer. I say it could be done.

(Testimony of Captain William Olsen.)

Q. But would it be careful, cautious and prudent seamanship to try to do it?

A. Yes, if you wanted the boat at Honolulu; yes.

Q. Now, suppose, in addition to those facts, Captain, that there was a fair swell on, more or less sea, under those conditions do you think it would be proper and careful seamanship to attempt to tow a vessel of that character?

A. Not if there was blowing a very strong breeze, or heavy sea.

Q. I said neither a strong breeze, nor did I say a thing about a heavy sea. I said a fair breeze, some swell and a moderate sea. Under those conditions, would it be proper, careful, cautious and prudent seamanship to tow such a vessel?

A. I think it would.

That is all.

Mr. GUS STREM, called on behalf of the libelees, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. JUDD.)

Q. Mr. Strem, what is your business?

A. I am a carpenter, ship's carpenter.

Q. How long have you followed your profession as such?

A. For twenty-seven years.

Q. Are you a seafaring man? A. Yes, sir.

Q. How long have you followed the sea?

(Testimony of Gus Strem.)

A. Twenty-two years.

Q. In August of last year were you employed by Cotton Brothers? A. I was; yes, sir.

Q. On what job? A. At Pearl Harbor.

Q. What were you doing the afternoon of August 4th, if you remember? A. On August the 4th?

Q. I withdraw the question. Did you ever see the house-boat that is in controversy in this case?

A. That is the time we towed the house-boat, on August 4th.

Q. Who towed up the house-boat?

A. The tow-boat "Kaena."

Q. The "Kaena"? A. Yes.

Q. Were you on the tug?

A. No, I was on the house-boat.

Q. What else was in that tow on that day?

A. There was a water scow and an anchor scow and a skiff.

Q. How were they arranged? Which came first?

A. First the house-boat was towed; then there was a water scow, ten by twenty-seven, or something like that; then the anchor scow, ten by twenty; and then a skiff, about sixteen foot skiff.

Q. Who made the tow up, Mr. Strem?

A. I did; I did myself; fastened the line in front. I was left in charge by Mr. Agassiz, of the firm of Cotton Brothers.

Q. You made the trip up to Honolulu, did you, at that time? A. Yes.

(Testimony of Gus Strem.)

Q. Where were you? What situation did you have? Where did you stay? Where were you?

A. When?

Q. On the trip up?

A. I was on the house-boat. When the house-boat started to break up I was right in front.

Q. What were you doing there?

A. Just sitting there watching the things, taking care of the things coming up.

Q. When did you first notice that anything was wrong?

A. Well, the first we noticed was when she started to break her fastenings on the starboard side. We were sitting there talking, the same as I am sitting here. The first thing I knew the deck started to keel over.

Q. What do you mean by "fastenings"?

A. That is, the way the house is fastened to the hull.

Q. Do you mean above the deck?

A. Right as fastened to the scow.

Q. After it went over what did you do, Mr. Strem?

A. We tried to save ourselves, to get away without getting drowned, to get back to the scows.

Q. By the way, when the tow left Pearl Harbor what were those two scows laden with, if anything?

A. What do you mean?

Q. What was in the water scow?

A. Nothing at all.

Q. And how about the anchor scow?

A. It was empty. What we used her for was laying

(Testimony of Gus Strem.)

anchors, ships' moorings, etc. There was no weight to that. The thing would not hurt anything on account of the tow.

Q. From your experience as a boat builder and from what you saw that day, will you kindly tell the Judge what you think caused the accident.

A. I could not tell that, only that the house was not strong enough to stand—only tie-nailed with twenty penny nails. Them posts (pointing to model) are only so fastened, so nailed, a little bit of rocking with a high house like that when the tug went to sea would naturally the minute you would start it, it break it loose; that is what happened. There was hardly any wind or anything; that is what I can say.

Q. How do you know, Mr. Strem, that the superstructure was fastened that way.

A. I seen it with my own eyes.

Q. After the house-boat was brought to Honolulu, or the hull of it, did you examine it? A. Yes, sir.

Q. Where was the house-boat at that time?

A. Laying right down here at Bishop wharf.

Q. What was the condition of that hull at that time?

A. Well, the hull was all right. Even the stove was there and a great many other things, the furniture, were still there, right on board yet.

Q. Then it was the next day after the accident?

A. Yes, after we got in the next morning.

Q. Was the hull in a seaworthy condition?

A. Sure.

(Testimony of Gus Strem.)

Q. Was that hull constructed with air-courses?

A. No; I never seen them.

Q. When you made that examination you didn't find any air-courses?

A. No, sir.

Cross-examination.

(By Mr. DUNNE.)

Q. Mr. Strem, when that tow left Pearl Harbor to come to Honolulu was the house-boat in a condition to be towed?

A. So far as my idea is concerned it was.

Q. You noticed nothing at all out of the way with it?

A. No, sir.

Q. Had it been up on the shore any?

A. Not that I know of. I have been there from the time she was towed down until she was taken away.

Q. Did you have any plank running from the boat to the shore?

A. We had a plank gang-plank.

Q. And then the house-boat was always afloat, was it?

A. Always afloat.

Q. It never was aground during those six months?

A. Not to my knowledge.

Q. You were there all the time?

A. I was right along. I was the first man there and the last that came away.

Q. And you made an examination of the hull when you got to Honolulu and found it was all right?

A. Yes, sir; I did.

Q. And your theory of this accident is that the

(Testimony of Gus Strem.)

house-boat, by reason of the rocking of the house-boat, got detached from the hull? A. Yes.

Q. When the tow was made up the tow-line was not fastened to the house at all, was it? A. No, sir.

Q. It was fastened to the hull, was it?

A. Fastened to the bitts. There were two bitts to each corner.

Q. With a bridle? A. Yes.

Q. And the tow-line was fastened to that bridle?

A. Yes.

Q. And then it was the movement, the rocking of the house-boat, that was strong enough to detach that house from the hull?

A. Yes. It loosened the fastenings of the house. That is all.

(Here the Court took an adjournment until Tuesday morning, May 24th, 1904, at 9:30 o'clock A. M.)

Tuesday, May 24th, 1904.

Morning Session.

JAS. B. AGASSIZ, being first duly sworn on behalf of the libelee, testified as follows:

Direct Examination.

(By Mr. BRECKONS.)

Q. What is your name? A. James B. Agassiz.

Q. Where do you live, Mr. Agassiz, at the present time? A. Oakland, California.

(Testimony of Jas. B. Agassiz.)

Q. State whether or not you are a member of the firm of Cotton Brothers & Company? A. Yes, sir.

Q. I will ask you whether or not the firm of Cotton Brothers & Company ever entered into a lease with Mrs. Mary K. Almy, relative to a house-boat.

A. Yes, sir.

Q. I hand you a document and ask you whether or not that is the copy of the lease, or rather, the lease, held by Cotton Brothers & Company? (Exhibiting document to witness.)

Mr. HUMPHREYS.—Is there any difference between that and the other?

Mr. BRECKONS.—Yes; the difference is that the copy submitted by me is witnessed by Mr. Canfield, and in the copy submitted by you there is no witness to the signature of Mrs. Almy. In this one there is.

Mr. HUMPHREYS.—That is the only difference?

Mr. BRECKONS.—The only difference.

Mr. HUMPHREYS.—The date is the same?

Mr. BRECKONS.—The date is the same. I say the same; I have not compared them, but if there is any difference I don't know of it.

(Lease was here offered in evidence and marked Libbees' Exhibit "A.")

The WITNESS.—A. That is a contract signed by our firm.

(Testimony of Jas. B. Agassiz.)

Q. Prior to the time the lease was entered into, Mr. Agassiz, if you know, you may state who was in possession and who had control of the house-boat described by you?

Mr. DUNNE.—Just a moment, please. We object to that, if the Court please, for the reason that it calls for a conclusion of the witness; who had control and who had possession is a matter of law to be determined by the Court upon such state of facts as the witnesses may make.

Mr. BRECKONS.—I will strike out the part “who had possession.”

Mr. HUMPHREYS.—I object to that, for the reason it is immaterial. The contract is the best evidence; and from whom he received manual possession is a matter wholly immaterial.

The COURT.—I suppose this is for the sake of the question suggested yesterday.

Mr. HUMPHREYS.—I believe we have had an arrangement with Mr. Breckons that the testimony of this witness and any other witnesses which the respondent might see proper to produce this morning, shall be heard subject to our objections, in order that the trial might not be delayed, we to have reserved our exceptions.

Mr. BRECKONS.—I desire to express my personal appreciation of the action of the Court and counsel to going on that way. (To the witness.) You may an-

(Testimony of Jas. B. Agassiz.)

swer the question. We understand counsel will attempt to take no advantage of the witness.

A. Henry Almy was in possession of the boat.

Q. Mr. Henry Almy you speak of? You may state what relation he is to Mary K. Almy, if you know.

A. Mr. Henry Almy is Mrs. Mary K. Almy's husband.

Q. At the time Cotton Brothers & Company, Mr. Agassiz, received the house-boat under this lease, from whom did they receive it?

A. They received it from Mr. Almy.

Q. The negotiations relative to the lease, such as the terms of the lease, the length of time, the conditions of the lease—with whom did Cotton Brothers deal in that respect, Mary K. Almy or her husband, Henry Almy?

A. They dealt with Mr. Almy.

Q. Do you know whether the lease was signed by Cotton Brothers & Company and where?

A. It was signed in our office.

Q. Do you know where Mrs. Almy signed the lease?

A. No; to the best of my recollection the lease was brought to me signed by Mrs. Almy, already signed, and I don't know where Mrs. Almy signed it.

Q. Who brought it to you, signed by Mrs. Almy, for your signature? A. Mr. Almy.

Q. I direct your attention to an interlineation in the lease we have just offered in evidence, an interlineation in ink, in longhand, and ask you if you know by whose direction or request such interlineation was made?

(Testimony of Jas. B. Agassiz.)

A. I believe that was made at Mr. Almy's suggestion.

Q. Up to the time the lease was finally executed, Mr. Agassiz, had you any acquaintance with Mrs. Almy whatever?

A. Up to the time the lease was made, I was acquainted with Mrs. Almy a year or two before.

Q. In connection with the lease of the house-boat, Mr. Agassiz, up to the time the lease was finally delivered to you executed, had you had any conversation with her relative to it? A. No.

Q. At the time it was executed, who was the managing partner of Cotton Brothers & Company in Honolulu? A. I was.

Q. Was there any other member of the firm here?

A. No, sir.

Q. After the lease was executed and you entered into possession of the house-boat under the terms of the lease, where was the house-boat kept? Where did she stay?

A. The house-boat was kept in Pearl Harbor.

Q. I want you to describe to the Court, Mr. Agassiz, just about where she was kept and how kept, in your description paying attention to whether she was aground or afloat.

A. She was kept near the place they call the "shark-pen," in Pearl Harbor, and she was moored near the beach, probably a few feet away from the beach, and had two anchors out to hold her away from the beach

(Testimony of Jas. B. Agassiz.)

and two lines on the shore to steady her and prevent her swinging back and forth.

Q. Now, during the time she was kept there you may state to the Court how frequently you saw her, Mr. Agassiz.

A. I saw her every day, because I was living on her, excepting probably once a week I would come to Honolulu for one or two days and go right back there. I was living aboard her.

Q. During the time she was there you may state whether or not any part of her was ashore or all afloat. What were the facts about that?

A. Afloat all the time.

Q. I desire you to take the photograph, Mr. Agassiz, introduced by the libelant in this case and to indicate to the Court, if you will go up to his Honor there, how she was anchored or how she was moored, showing the places, and if there are any hooks there by which she was moored, showing the Court that.

(The witness here walked up to his Honor and illustrating his remarks by references to the photograph in question, made the following statement:)

The house-boat was moored by two anchors. This is one (pointing), and there was one (pointing), which held her from coming up onto the beach; and then there were two lines—that is one of the lines laying down in the water (pointing), which was made fast to a stake in the beach. The stake must be further back. On the other side there was an old anchor built into the bank.

(Testimony of Jas. B. Agassiz.)

That does not show in the photograph. The anchor was built into the bank. I suppose the sand must have covered it up. That is the only part of the rope showing (pointing), but, anyway, there were two ropes out, one on each side, that prevented her from swinging back and forth on the bank. Then there were two anchors out on the out-shore end, farthest back from the shore, to hold her away from the shore, and they were separated far enough to keep the other end from swinging astern.

The COURT.—How far did you say she was from the beach?

A. Well, the gang-plank we had extended to the beach was twenty-six feet long and just reached the bank at high tide. This plank here (pointing) is twenty-six feet long; so she was practically twenty-six feet from the low-tide line.

The COURT.—Q. How much does the tide rise and fall?

A. I don't think it rises and falls more than two feet.

The COURT.—Q. That was taken at low tide, was it? (Referring to the photograph.)

A. It seems to have been; yes. The stakes here would be high tide.

Mr. BRECKONS.—Q. Now, describe where the boat was anchored and how she lay. I will ask you whether

(Testimony of Jas. B. Agassiz.)

or not at low tide any part of that boat touched the beach? A. No, sir.

The COURT.—Q. What do you mean by that, Mr. Breckons; do you mean whether it touched the visible beach or whether it was aground?

Mr. BRECKONS.—Q. At low tide, you may state whether or not any part of that boat was aground.

A. No, sir; it was not aground at all.

Q. Mr. Agassiz, were you on the tug the day the house-boat was brought to Honolulu? A. No, sir.

Q. How long before that had you left Pearl Harbor?

A. I think I left the day before. I left in the morning.

Q. Prior to the time you left Pearl Harbor—by the way, what day was that, do you remember?

A. I don't remember the day.

Q. Was it the day before you brought up the house-boat?

A. I left in the morning, and I think the house-boat was towed up the next afternoon. It may have been the second afternoon.

Q. Prior to that time you may state whether or not you had any conversation with Mr. Almy, the husband of the libelant in this case, relative to the disposition of the house-boat. Answer that yes or no.

A. Yes, I had a conversation.

Q. And how long before the house-boat was brought up was it that you had that conversation?

(Testimony of Jas. B. Agassiz.)

A. Well, I don't recollect exactly. I think it was about two months.

Q. Now— (To Mr. Humphreys.) I suppose this will go in subject to the objection?

Mr. HUMPHREYS.—I understand we are reserving our exceptions.

Mr. BRECKONS.—(Continuing question.) What was that conversation?

A. Mr. Almy asked me when we would be through with the house-boat, and I told him I thought we would be through with her in about two months; that would make it either July or August. I think I said we would be through in July. And he then asked me whether I would tow the boat to Honolulu for him, and I said yes, I would tow her back to Honolulu with my own plant as a favor to him, but I would not take any responsibility on the tow. And he said: "All right, when you get through with the boat in Pearl Harbor will you tow her to Honolulu for me," and I said "yes."

Q. When you left, Mr. Agassiz, on the third of August, or, rather, on the day before the house-boat was towed up, if you don't remember the dates, you may state whether or not you left any instructions with your men relative to the bringing up of the house-boat to Honolulu?

A. Yes; I told Mr. Strem, who was in charge of everything on the beach there at the time, to have the tow made up in a certain way, and to bring the tow

(Testimony of Jas. B. Agassiz.)

when the water was perfectly calm, as near as possible to being calm.

Q. To go back to one matter, Mr. Agassiz, about Mr. Almy's handling of this house-boat—prior to the time you leased her, who lived on board?

A. Mr. Almy lived on board and I lived on board and Mr. Thompson.

Q. What was Mr. Almy doing on board the house-boat prior to the time you leased it?

A. He was running a boarding-house.

The COURT.—Q. He was running what?

A. He was running a boarding-house; boarded my men.

Q. And do you remember the circumstance of Mr. Almy's arrest by the Territorial authorities?

A. I remember it; yes; but I was not there at the time he was arrested.

Q. How long was that before you entered into the lease?

A. I couldn't say exactly; I think inside of a month.

Q. Do you know from any conversation with Mr. Almy why he was arrested?

A. He was arrested—in a conversation with him—yes, I know.

Q. Why?

A. He was arrested for selling liquor.

Q. Where? A. On the boat-house.

Q. Mr. Agassiz, the day before the house-boat was

(Testimony of Jas. B. Agassiz.)

brought up to Honolulu you may state whether or not any scows were brought up.

A. Yes, sir; there were scows brought up.

Q. And of Cotton Brothers & Company's scows what remained after that date; what scows?

A. What scows remained in Pearl Harbor?

Q. Yes.

A. I don't think there were any scows left. I think that was the last tow.

Q. Do you know what was brought up with the house-boat? A. Yes, sir.

Q. How do you know?

A. Because I gave instructions to Mr. Strem to make up the tow before I left there.

Q. Well, after the arrival of the tug in Honolulu, the tug which had the house-boat in tow, did you see what scows she had brought up?

A. No; I went away on the "Alameda" that morning. I didn't see the scows.

Q. Do you know what scows were brought up that day? If you know, why tell what was brought up.

A. I know, yes.

Q. What was brought up?

A. The tow was made up before I left. There were two water scows brought up and also a row-boat, I think, a little pontoon boat.

Q. Now, Mr. Agassiz, I want to ask you the relative sizes of the house-boat and any of the scows that were brought up.

(Testimony of Jas. B. Agassiz.)

A. The size of the hull of the house-boat—well, I could not state that definitely, because I never measured it; but I think she is about twenty by probably thirty-two, or something like that. And you want the size of the—

Q. (Int.) Which was the larger in that tow as you saw it made up—which was the largest vessel?

A. The house-boat was the largest vessel in the tow.
(No cross-examination.)

Mrs. MARY K. ALMY, called on behalf of the libelees, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BRECKONS.)

Q. Mrs. Almy, I believe you are the libelant in this case? A. Yes.

Q. I will ask you, Mrs. Almy, in so far as you were concerned, when the lease between you and Cotton Brothers & Company terminated?

A. When it terminated?

Q. Yes.

A. Well, they took it for six months with the privilege of renting it from month to month after that.

Q. But up to what time did you receive rent under that lease; that is the question?

A. I received my last rent in July.

Q. And the last rent you received, then, as I understand it, was for the month of July?

(Testimony of Mrs. Mary K. Almy.)

A. For the month of July.

Q. And you received nothing for the month of August? A. Nothing.

Q. There was nothing due?

A. Well, I should think it would be due because they had not turned it over.

Q. But, under the terms of the lease, Mrs. Almy, the house-boat was to be delivered at Pearl Harbor, returned to you?

Mr. HUMPHREYS.—We object to that, if the Court please. The lease speaks for itself.

Mr. BRECKONS.—Let me finish my question. Under the terms of the lease the house-boat was to be delivered to you at Pearl Harbor? I will ask you whether you know anything at all about why it was brought, or attempted to be brought, to Honolulu?

A. Well, for the simple reason that they towed it down, and I took it for granted they would return it here.

Q. You say for the simple reason they towed it down there, and you took it for granted it would be returned here?

A. Honolulu.

Q. So that the bringing of the house-boat to Honolulu, Mrs. Almy, was with your knowledge, was it?

A. Yes, I knew it.

Q. And under the assumption by you that it would be returned to Honolulu under the terms of the lease?

A. Yes.

(Testimony of Mrs. Mary K. Almy.)

Q. And you knew it was coming here?

A. Yes, I knew it was coming up here.

Q. This is a letter signed by you, Mrs. Almy, I believe (showing letter to witness). A. Yes.

Q. So that you were in communication with Cotton Brothers & Co. relative to the bringing of the houseboat to Honolulu and requested them, Mrs. Almy, to let you know where they would deliver it to you; is that correct?

A. I asked them to inform me when they would bring it up.

Mr. BRECKONS (To the Court).—I offer this in evidence.

Mr. HUMPHREYS.—No objection to this.

(The letter offered in evidence was a letter dated June 7th, 1903, addressed to Messrs. Cotton Brothers & Co., and signed by Mrs. Mary K. Almy, and upon being received in evidence was marked Libelees' Exhibit "B.")

Q. I hand you a paper, also, Mrs. Almy—I am mixed up here. Mrs. Almy, I ask you whether that (showing letter to witness) was also a communication sent by you to Cotton Brothers & Co? A. Yes.

Mr. BRECKONS (To the Court).—I offer this in evidence.

Mr. HUMPHREYS.—No objection.

(The letter offered in evidence as above set forth was a communication dated July 29th, 1903, addressed to

(Testimony of Mrs. Mary K. Almy.)

Messrs. Cotton Brothers & Co., and signed by Mrs. Mary K. Almy, and was marked Libellees' Exhibit "C.")

Mr. BRECKONS.—Now, Mrs. Almy, referring to your letter of June 7th, which has been introduced in evidence, I will ask you whether you got a response to that, and also whether this is the response? (Showing letter to witness.) A. Yes.

Mr. BRECKONS (To the Court).—I offer this in evidence.

(The letter last offered in evidence was a communication dated Honolulu, June 9th, 1903, addressed to Mrs. Mary K. Almy, and signed by Cotton Brothers & Company.)

Cross-examination.

(By Mr. DUNNE.)

Q. A portion of the correspondence between you and the respondents has been received in evidence. I will ask you to look at this letter and state whether you received this also from Cotton Brothers & Company?

A. Yes, sir.

Mr. BRECKONS.—No objections.

Mr. DUNNE.—(Reading:)

Honolulu, T. H., August 5, 1903.

Mrs. Mary K. Almy, Honolulu.

Dear Madam: We beg to inform you that your house-boat, which, at the request of Mr. Almy, in your behalf, we undertook to tow without compensation from Pearl

(Testimony of Mrs. Mary K. Almy.)

Harbor to Honolulu, suddenly filed with water and careened over on its side without warning on the way up. We anchored the boat, which was still afloat, and as soon as possible towed the submerged scow into Honolulu Harbor. The house on the scow is demolished, and we have saved as much of the superstructure as we could, and the scow and everything rescued is now at the end of the mauka Bishop Estate wharf. We have a man in charge, but must decline to take responsibility for the boat, which is now subject to your direction. We remain,

Very truly yours,

(Sgd) COTTON BROS & CO.

Per CANTIN.

(The above letter was then offered and received in evidence and marked Libelant's Exhibit No. 3.)

Q. In this letter there is this statement: "We beg to inform you that your house-boat, which, at the request of Mr. Almy, in your behalf, we undertook," etc., I will ask you if you ever directed Mr. Almy, in your behalf, or otherwise, as stated in that letter?

A. I did not.

That is all.

Redirect Examination.

(By Mr. BRECKONS.)

Q. In the answer you gave in response to the question put by counsel, I desire to ask you whether, prior to the time the lease in question was entered into—

(Testimony of Mrs. Mary K. Almy.)

rather, who made the negotiations, yourself personally, or your husband?

A. Mr. Savidge drew up the papers and they were brought home to me to look at and sign my name to. Mr. Almy delivered them.

Q. Up to that time you had entered into no negotiations yourself personally with Cotton Brothers & Company? That was all done by your husband, was it not?

A. No, it was not.

Q. With what member of the firm did you deal, Mrs. Almy? A. About the lease?

Q. Yes.

A. Well, Mr. Almy, of course, talked with them and told them for me.

Q. And prior to that time you had been in possession of the house-boat, yourself or Mr. Almy?

A. I had rented the house-boat to Mr. Almy.

Q. So that Mr. Almy had possession of the house-boat by virtue of a lease from you?

A. No; we didn't enter into a lease. I simply rented him the house-boat, he paying me so much money for it.

Q. And under that arrangement he was the man who had the possession and control of the house-boat?

A. Well, I was in possession of it down there.

Q. Were you ever in possession of it, yourself, personally?

A. No, I was not in possession; always Mr. Almy took care of it for me. I was on the house-boat when he left, when he left and came ashore.

(Testimony of Mrs. Mary K. Almy.)

Q. So far as looking after her, Mrs. Almy, the care of it, to see where she was, you left that to your husband, he being a man and you a woman and not caring to have possession?

Mr. HUMPHREYS.—I object to that.

Mr. BRECKONS.—If they object to that line of questioning I withdraw the question.

Recross-examination.

(By Mr. DUNNE.)

Q. Who collected the rent?

A. I did, Mr. Dunne.

Mr. BRECKONS.—We will make an admission that every month Mrs. Almy collected the rent.

JAMES A. LYLE, called on behalf of the libelees, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. JUDD.)

Q. What is your business, Mr. Lyle?

A. Superintendent of the Marine Railway, Honolulu.

Q. How long have you been engaged in that business?

A. I have been engaged in it for the last four years, superintendent of the Marine Railway, and carrying on ship work there ever since the railway was built.

Q. Previous to that time what were you doing?

A. Working on ship work on the coast.

(Testimony of James A. Lyle.)

Q. What do you mean by ship work?

A. That is my trade; I have served in that line.

Q. Do you mean shipbuilding?

A. Shipbuilding, yes.

Q. Did you ever see the house-boat known as the Almy house-boat?

A. Yes, I have.

Q. Do you remember seeing it after the accident to it?

A. Yes, I went over to look at her.

Q. Who asked you to go there?

A. Nobody.

Q. What was the purpose?

A. Just curiosity; that is all.

Q. What did you do when you went there?

A. I went there to see how the house went off her.

Q. Did you make an examination of her?

A. Yes; I looked her over.

Q. Kindly state to the Court what the condition of the hull was at that time?

A. Well, the hull was all right, as far as the hull was concerned only the house part of it went over the side; and what I wanted to find out was how this top went off the scow without hurting the scow, and I found out the reason; that is what I went there for.

Q. What do you mean by saying the hull was all right?

A. The hull was not injured any. In pumping out the water it could be used.

Q. Any leak in the hull?

A. No leak in the hull at all, perfectly tight.

(Testimony of James A. Lyle.)

Q. What was your opinion, as an expert boat-builder, as to how that accident could have happened?

Mr. DUNNE.—We object to that on the ground it is irrelevant and incompetent and immaterial and without foundation, and under the circumstances of the case not a proper subject matter as expert testimony by this witness.

The COURT.—Have you a hypothetical question to put to the witness? There are no circumstances that he is supposed to be acquainted with so far.

Mr. JUDD.—I withdraw the question.

Q. What did you find on the deck of the hull?

A. On the deck of the hull?

Q. Yes.

A. There was nothing on the deck of the hull.

Q. Was it swept clean?

A. Yes, they had taken the stuff that was on it off and put it on the wharf and the men were working on it at the time I was there.

(No cross-examination.)

Mr. H. N. Almy, called on behalf of the libelees, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. Mr. Almy, you have heard the testimony of Mr. J. B. Agassiz relative to a certain alleged conversation had with you, the substance of which was that you

(Testimony of H. N. Almy.)

asked him to tow the house-boat to Honolulu for you and he said he would do so as a favor to you but without responsibility to him. Did any such conversation as that ever take place between you and him?

A. No.

Q. What was said?

A. I met him on the street and I remember I asked him how soon they expected to be through. He said he didn't know. I then asked him if he thought they would be through by the first of July. He said he hardly believed they would; and that was the substance of the conversation.

Q. Was anything said, directly or indirectly, in the conversation about towing up your house-boat from Pearl Harbor to Honolulu as a favor to you and without responsibility to him? A. No.

Q. Now, have you at any time had any conversation with Mrs. Almy on this subject matter of bringing that house-boat up as a favor to you and without responsibility to the towing people? A. No.

Q. Did Mrs. Almy at any time ever authorize or say to you that you could make any contract of that character with Mr. Agassiz or the towing people, or anybody else? A. No, sir.

That is all.

Cross-examination.

(By Mr. BRECKONS.)

Q. Mr. Almy, when did you first know that the house-

(Testimony of H. N. Almy.)

boat was to be brought to Honolulu, rather than left at Pearl Harbor?

A. When did I first know it was coming up here?

Q. That it was to be brought up here and not left at Pearl Harbor, as provided in the lease: When did you first find out?

A. I think on the day before the house-boat came up.

Q. Who told you? A. Mr. Leonard?

Q. Mr. Leonard, with Cotton Brothers & Company?

A. He was the time-keeper.

Q. That was the first you heard about its coming to Honolulu? A. Yes.

Q. Who negotiated the lease?

A. How do you mean?

Q. Who fixed up the terms of the lease for Mrs. Almy?

A. Mr. Agassiz made me the offer and I submitted it to Mrs. Almy and then I told Mr. Agassiz afterwards that Mrs. Almy accepted his proposition. He asked me then to have a lease drawn up.

Q. You are the husband of the libelant in this case, Mrs. Almy's husband? A. Yes.

Q. And you were informed the day before by Mr. Leonard that it was to be brought up to Honolulu?

A. I was.

Q. Did you make any protest?

A. No.

Q. Why?

(Testimony of H. N. Almy.)

Mr. HUMPHREYS.—I object as immaterial why he made no protest.

(Objection withdrawn.)

Mr. BRECKONS.—Why?

A. Well, I had no objection to make.

Q. Now, that is the first time you knew that, the day before? A. Yes.

Q. Did your wife know anything of it before?

A. She wrote a letter to Cotton Brothers & Company which they did not answer.

Q. The first time you knew that Mrs. Almy knew that the house-boat was to be brought to Honolulu was the day before it was brought up?

A. The first time we had actual knowledge of it; yes.

Q. Had no idea before that time, either you or Mrs. Almy, whether it was to remain at Pearl Harbor or be brought to Honolulu?

A. I supposed they would bring it to Honolulu; they took it away from Honolulu.

Q. So that up to the day before the house-boat was brought to Honolulu, Mr. Almy, your knowledge of what was to be done with her, and Mrs. Almy's knowledge, so far as you know, as to what was to be done with her, was confined simply to a supposition that as she had been taken to Pearl Harbor from Honolulu she would be returned here?

Mr. HUMPHREYS.—Just wait a moment. He asks not only for the witness' opinion in regard to the return

(Testimony of H. N. Almy.)

of this house-boat, but the opinion of Mrs. Almy, so far as he knew. Now, then, even if he could have learned, if the Court please, of Mrs. Almy's opinion about it, it would be entirely immaterial.

Mr. BRECKONS.—I strike out the Mrs. Almy part of the question.

Q. Now, what do you say?

Mr. HUMPHREYS.—I submit the question as put is unintelligible.

(Last question read by reporter, omitting therefrom the reference to the opinion of Mrs. Almy.)

Mr. BRECKONS.—I submit it is intelligible.

The COURT.—Yes, it is intelligible.

A. Well, does he say up to the day before?

The COURT.—Yes.

A. Before I was told on the street?

The COURT.—Yes.

A. Why, I think so; yes.

Mr. BRECKONS.—Mr. Almy, you looked after your wife's interests in the house-boat? Did you manage it for her?

A. No; of course there was not much to look after. The boat was leased and that was the end of it. Mrs. Almy collected the rents.

Q. When you heard she was to be brought to Honolulu, I suppose you informed your wife?

(Testimony of H. N. Almy.)

A. Yes, that Monday.

Mr. HUMPHREYS.—I move the last question and answer be stricken out. It is immaterial what he informed his wife. I object to it on the ground that it calls for information from the husband to the wife and under our statute that is privileged.

The COURT.—It must be stricken out if objected to.

Mr. HUMPHREYS.—We object to it.

The COURT.—Strike it out.

Mr. BRECKONS.—We take an exception, your Honor.

Redirect Examination.

(By Mr. DUNNE.)

Q. You stated, Mr. Almy, that to one of those letters your wife wrote to Cotton Brothers she never got an answer to. Do you think you could identify that letter?

A. I could.

Q. Is that the letter? (Showing letter to witness.)

A. Yes.

Mr. DUNNE (To the Court).—Referring to Libelee's Exhibit "C."

Q. (To the Witness.) In Libelant's Exhibit No. 3, the letter dated August 5th, 1903, this language appears: "We beg to inform you that your house-boat which at the request of Mr. Almy, in your behalf, we undertook to tow without compensation"—I ask you whether you ever made any request to Cotton Brothers & Company

(Testimony of H. N. Almy.)

on behalf of your wife or otherwise to tow the house-boat to Honolulu without compensation?

A. I did not.

Recross-examination.

(By Mr. BRECKONS.)

Q. You stated you were acquainted with that letter? You saw it? A. I saw that letter.

Q. In fact all letters in connection with the house-boat you were fully acquainted with?

A. Yes, sir; I think Mrs. Almy showed them to me.

The COURT.—Q. It appears in evidence that you remained on this house-boat during the time it was leased, keeping and boarding the men?

A. No, sir; that was before, a month before.

Mr. HUMPHREYS.—The statement of Mr. Agassiz was that Mr. Almy was running a boarding-house, boarding his gang of men. Subsequently, Mr. Agassiz rented the house-boat from Mrs. Almy and conducted this boarding-house himself; and afterwards this lease was made, after Mr. Almy ceased to conduct the boarding-house himself.

The COURT.—There is one thing not clear to my mind. Mention is made about the company taking this boat down to Pearl Harbor and it was expected they would bring it back. It was taken down some time before the lease apparently. How long?

A. About three months. They went down; they towed her down there and after the dredger sank, the

(Testimony of H. N. Almy.)

big dredger, they concluded they would prefer to run the boarding-house themselves, and then this lease with Mrs. Almy was made. Prior to that time they had an agreement with me to run their gasoline launch and also run the boarding-house.

The COURT.—Q. And was the house-boat taken down there with that in view?

A. It was taken down entirely for their work. It was taken down there for their work and was never used for anything else, and she was a new boat.

The COURT.—Q. And you kept a boarding-house there? A. Just for their men.

The COURT.—Q. Under an agreement with Cotton Brothers?

A. Under an agreement with Cotton Brothers. That was prior to July 1st, when this lease was made out.

Mr. BRECKONS.—Q. So that the tow down there was not under this lease? They took her down for you and you used the house-boat for a boarding-house? That was three months before the lease was entered into, wasn't it? A. Yes.

Q. And the lease was not made at the time she went down? A. No.

Re-redirect Examination.

Mr. DUNNE.—One matter, before leaving the stand. You say she was fitted up for the work of Cotton Brothers? What do you mean?

(Testimony of H. N. Almy.)

A. Well, we had intended going to Pearl Harbor ourselves to live in this boat and she had our furniture in, and Mr. Agassiz wanted to rent the boat of Mrs. Almy. I talked with Mrs. Almy and she preferred not to rent the boat, because she thought they would disfigure her. Afterwards a proposition was made for me to go down with the boat and we took our furniture out here and she was fitted up with bunks upstairs and also downstairs with tables and chairs and everything, bedding and so on, and blankets and everything for the accommodation of forty men. That was done here in Honolulu.

Q. I will ask you if in the month of August, 1903, there were any means or appliances at the place at which she was at Pearl Harbor to restore her to the former condition, to remove these bunks and put her into the condition she was in before she was leased to Cotton Brothers?

Mr. BRECKONS.—I object to that, as not proper and as not proper redirect testimony.

The COURT.—I will overrule your objection pro forma.

Mr. DUNNE.—Q. Will you explain that?

A. Why, no; there was no means of refitting her, painting her, or hauling her out, or anything, at Pearl Harbor, and that had to be done. This interior work had to be taken out and this boat renovated before our

(Testimony of H. N. Almy.)

furniture, which was stored here, could be replaced for our own use.

Q. Could that be done in Honolulu?

A. Could that be done in Honolulu?

Q. Could the renovation of this boat be done at Honolulu—the renovation of the boat?

A. Certainly it could be done here. That is just what I was saying.

That is all.

Re-recross-examination.

(By Mr. BRECKONS.)

A. And so was that the reason, Mr. Almy, while in making the negotiations for the lease for Mrs. Almy you agreed that it should be returned at Pearl Harbor?

A. I didn't make any such negotiations?

Mr. ALLAN DUNN, called on behalf of the libelant, in rebuttal, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. DUNNE.)

Q. Mr. Dunn, do you remember the witness, Burt Wheeler, who was on the witness-stand in this case?

A. I do.

Q. Shortly after the injury to this house-boat did you see Mr. Burt Wheeler? A. I did.

Q. Where?

A. I was riding home to my evening meal on the

(Testimony of Allan Dunn.)

street-car, the Rapid Transit car; I was living at the Melrose. I was sitting next to a friend who had read in the Sunday paper that Mr. Hobron and myself had been on the "Glays." He said to me—

Mr. BRECKONS.—No, no, no.

Mr. DUNNE.—Did you have a conversation with this man concerning the house-boat? A. I did.

Q. Where was the witness Burt Wheeler sitting?

A. Behind us.

Q. Behind you. While having that conversation with your friend did Mr. Wheeler inject himself into the conversation?

Mr. BRECKONS.—I object to the question as not rebuttal, as leading and incompetent and irrelevant. On this proposition the witness can be asked simply at such and such a time and such a place you may state whether the witness Burt Wheeler said so and so.

Mr. DUNNE.—Q. On that occasion, on that car, under the circumstances that you have described, I ask you if the witness Burt Wheeler did not state that Cotton Brothers—referring to this tow—had made a nice mess of it; that it was a bum job of towing the house-boat between the tug and the scows; and that he was not surprised that the house-boat was wrecked; that he was on the tug at the time; that the men on the house-boat told him that they had been calling to the tug for fifteen minutes before anything was done towards helping them and that they said the tug-men could not have

(Testimony of Allan Dunn.)

been watching their tow; and that those on board the house-boat had been drinking whisky and were not watching the house-boat's condition; and, further, that some of this whisky was saved? A. He did.

Cross-examination.

(By Mr. BRECKONS.)

Q. You were acquainted with Mr. Wheeler?

A. By sight.

Q. Never spoke to him before? A. Never.

Q. So he was an absolute stranger?

A. He was.

Q. And did you know he had never seen you before?

A. So far as I know.

Q. Was he drunk or sober? A. Sober.

Q. And outside of communicating with you, an utter stranger, on the delinquencies of his employers, he gave no other evidences of insanity?

A. None except loquacity.

Mr. DUNNE.—That is the case of the libelants.

I hereby certify that the foregoing is a full, true and correct transcript of the proceedings had and testimony taken on the trial of the above-entitled cause, as transcribed from my stenographic notes taken on the trial thereof.

GEO. P. THIELEN,

Official Reporter.

[Endorsed]: Title of Court and Cause. Filed June 9th, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

From Minutes U. S. District Court, Vol. 3, Page 69, Friday, June 17, 1904.

[Title of Court and Cause.]

Order Extending Time to File Briefs.

Now, upon motion of Mr. J. J. Dunne, of proctors for the libelant, it is ordered that each side may have ten days additional time within which to file briefs herein.

From Minutes U. S. District Court, Vol. 3, Page 79, Monday, June 27, 1904.

[Title of Court and Cause.]

Order Extending Time to File Briefs.

Now, upon motion of Mr. J. J. Dunne, of counsel for the libelant, it is ordered that each side have ten days additional time within which to file briefs herein.

From Minutes U. S. District Court, Vol. 3, Page 156, Thursday, September 15, 1904.

[Title of Court and Cause.]

Judgment.

This above-entitled cause having been previously tried, argued and submitted, and the Court being fully advised in the premises, this day rendered its written decision herein ordering that a decree be entered in favor of the libelant above named in the sum of eighteen hun-

dred and fifty dollars and costs. To which decision counsel for the libelee excepted and gave notice of appeal.

In the District Court of the United States, in and for the District and Territory of Hawaii.

Special September Term, A. D. 1904.

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.
E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

A. S. HUMPHREYS and J. J. DUNNE, Proctors for Libelant.

R. W. BRECKONS and ATKINSON, JUDD & MOTT SMITH, Proctors for Libelees.

Decision.

The libelant has brought this libel for damages for the loss of her house-boat, which was wrecked on the open sea while the libelees were attempting to tow it from Pearl Harbor to the Port of Honolulu, August 4th, 1903. The libel alleges that the accident was due to the carelessness and negligence of the libelees, and sets

forth in particular the following conduct on their part as showing such carelessness and negligence: First: The house-boat was placed in the same tow with two laden scows, all arranged in what is called a tandem tow, in which the house-boat followed the towing steamer and was followed by the two scows, one after the other, which, it is alleged, was, considering the state of the weather and the sea, and the nature of the construction and the plan of the house-boat, an improper and defective arrangement which was a proximate cause of the accident. Second: The careless and negligent selection by the libelees of the time in which the tow was attempted in relation to the conditions of wind and sea then prevailing which was a proximate cause of the said loss and damage. There was also a general allegation of carelessness and negligence in relation to the manner in which the tow was operated, but there being no evidence on this point of any special significance, I shall make no further allusion to it.

The libelees in their answer say in substance that they leased the house-boat from the libelant from January 1st, 1903, to July 29th, 1903, by a written lease, a copy of which is attached to the answer; that during all the times mentioned in the libel, H. N. Almy—the husband of the libelant—was in charge and control of the house-boat and acting as her agent in regard to the same; that the value of the same was, up to the 4th of August, 1903, \$1,500; that pursuant to the lease it became their duty at the termination thereof, on the 29th of July, 1903, to deliver the house-boat to libelant at Pearl Har-

bor, and that she was notified of such termination that she might take possession; that at such termination of the lease she requested the libelees to remove the house-boat to the port of Honolulu for her convenience; and that they thereupon agreed to do so but under the express stipulation that they should not be responsible for any loss or damage of or to the house-boat that might occur during such removal, and that pursuant to such agreement they proceeded to remove the same from Pearl Harbor to the port of Honolulu on the 4th of August, 1903. They admit that two laden scows formed a part of the same tow and allege due care and good seamanship in the construction thereof, and that a light breeze was blowing, the sea was smooth and there was no appreciable swell; that when the tow was near to Kalihi Channel the house-boat suddenly went over on one side and thereupon the libelees towed the same into shallow water and anchored her, and then proceeded to Honolulu with the scows and the persons who had been on the house-boat; that after reaching Honolulu the towing steamer returned to the house-boat and towed her to the port of Honolulu; that the turning over of the house-boat was not due to carelessness or negligence on the part of the libelees but, as they were informed and believe, was due to the fact that the house-boat was not properly built into the scow but was simply tacked thereto with ten-penny nails which became gradually loosened from the "rocking of the scow." They further allege that at no time after the 29th of July, 1903, were they or either of them in the sole pos-

session or control thereof under or pursuant to the terms of said lease. This position is, however, modified by the brief of counsel for libelees, in which (page 10) they say "as a matter of accommodation to the owner of the house-boat, the lessees waived their right under the lease to have the boat returned to Pearl Harbor, and undertook to deliver the house-boat at Honolulu." They further aver that the house-boat was not a total loss and that libelant has not suffered a loss of \$2,500 as alleged in the libel.

The lease, made a part of their pleadings by the libelees, is not disputed by the libelant. It is dated January 1st, 1903, and was executed by the parties to this suit. The term of the lease is six months with the privilege of extension from month to month for not over three months more. The lessees, the libelees in this case, covenant to pay the rent; that they will not remove the house-boat from Pearl Harbor; that they will provide proper moorings; that they shall be liable for all damages to the house-boat from stranding or wreck; that in case of total loss of the house-boat they will pay to the lessees two thousand five hundred dollars, and that at the termination of the lease they will return her in good order and condition, ordinary wear and tear excepted, but withholding themselves from liability from damage by fire.

The claim of the libelees in their answer, that at the alleged termination of the lease on July 29th, they notified libelant of such termination, and that thereupon she requested them to deliver the house-boat at the port

of Honolulu, and that they agreed to do so on the understanding that such removal to Honolulu should be at her risk, is modified by their testimony, in which Mr. Agassiz, one of the libelees, testifies that about two months before the wreck of the house-boat, Mr. Almy asked him if, when he was through with her he would tow her up to Honolulu for him, and he, Mr. Agassiz, agreed to do so as a favor to him, but without taking "any responsibility of the tow," which was assented to by Mr. Almy. Mr. Almy, in rebuttal, denied that any such conversation or agreement had taken place, admitting, however, that he had asked Mr. Agassiz sometime before July, when he expected to be through with the house-boat.

During the hearing and in their brief, the counsel for the libelant repeatedly referred to the lease of the house-boat as containing provisions requiring her to be returned to the owner at Pearl Harbor at the termination of the lease. There is no such provision. The lease recites that at the date of its execution the house-boat was lying at Pearl Harbor, and being silent as to the place of its return to the owner, the implication would be that it would be returned at Pearl Harbor, unless some other arrangement should be subsequently made, which was the case.

The defense may be stated briefly as follows: There was no negligence or carelessness on the part of the libelees in relation to the attempted removal of the house-boat to Honolulu; the wreck of the same was caused by its own inherent weakness, whereby it was un-

able to stand the "gentle rocking incident to the towing"; that the service attempted to be performed by the libellees being gratuitous, or, as they describe it, "a matter of accommodation to the libelant," they cannot be held to "a high degree of care and prudence"; and the value of the house-boat at the time of the accident was only fifteen hundred dollars.

Much attention was given at the trial to the question of the construction of the tow, the opinion of expert witnesses being much divided. The following opinions were, however, favorably impressed upon my mind from this evidence, to wit: On the part of the libelant, the weaker vessel should come last in the tow, because she would be more protected by the tow ahead of her, and because in the intermediate position, with the towing steamer pulling ahead and the scows dragging behind, there would be more strain; also it would have been safer to tow the house-boat by itself, because of the greater ease of handling one vessel in tow rather than several, and of favoring her in a seaway; on the part of the libellees; a small craft towed behind a large one will tend to steady it like a rudder.

There was such contradictory evidence as to the size of the scows which were towed behind the house-boat, and whether or not they were laden, in spite of the fact that the answer admits that they were laden scows. The weight of evidence as to their size supports the contention that they were small scows.

I attribute the disaster mainly to the rolling of the house-boat caused by the swell of the sea, and not to

“the gentle rocking incident to the towing,” as the counsel for the libelees contend. If the seams of the house-boat scow had opened from her having lain aground at one end for six months or more, as Mr. Scott and Mr. Wheeler, two of the libelees’ witnesses, said had happened, and she had taken in some water in consequence thereof after getting to sea, the presence of such water in her hull in any considerable quantity would inevitably have aggravated any tendency to roll caused by the wave. In the opinion of these two witnesses this was the proximate cause of the accident.

Mr. Dunn, a witness for the libelant, testifies to open air-courses in the hull of the house-boat just below the platform on which the superstructure was placed. He thinks they were two or three inches wide and running nearly across the width of the hull. This testimony is denied by several witnesses for the defense, but as their testimony is negative in character, it does not overthrow the positive testimony of Mr. Dunn.

There is no doubt that, after the accident to the house-boat, there was a considerable quantity of water in the hull, which would have been a proximate cause of the disaster if it had been present before that took place. If this water entered the hull through the air-courses or otherwise at the time of the accident when the house-boat was in a partially capsized condition, its presence had no significance as to the questions at issue. The evidence is insufficient to prove that the water was present early enough to have had any influence in causing the injury.

Much attention was given by the defense at the trial to the theory that Mr. Almy was the agent of the libelant, and therefore he had authority to contract with libelees to tow the house-boat to Honolulu at her risk. I understand from the brief of counsel for libelees that this point is now waived, that is, they now admit "that one may not make a contract relieving himself from the result of his own negligence," and rely on their theory of the law, that in a case of a gratuitous bailment a high degree of care and prudence is not required by any principle of law. This being the case it becomes unnecessary to consider the question of Mr. Almy's authority as agent for libelant.

I find the facts in relation to this point to be, that under the lease the libelees were entitled to deliver the house-boat at the end of the lease to the lessor at Pearl Harbor; that a subsequent agreement was entered into between the parties, changing the locality of delivery to Honolulu without charge, the allegation of the answer that after July 29th, the house-boat was not in the possession of the libelees under the lease, being unsupported by evidence and inconsistent with the facts of the case.

Parsons has the following in regard to responsibility in the case of a gratuitous bailment.

"It may be gathered from the cases and from obvious reasons, that where the work to be done requires peculiar skill and care and the mandatary undertakes it in such way as to be bound to go through with it, the want of the required skill and care would be negligence enough": 2 Parsons on Contracts (6th ed.) 115.

The law is clear that although one undertaking to tow does not assume the obligation of an insurer nor the liability of a common carrier, yet he must exercise that degree of care and skill which the circumstances of the weather and the condition of the tow reasonably require for the safe conduct of the enterprise, and his liability for negligence is not dependent on his towage agreement, but may be based on tort.

“Liability of a tug for damage caused by negligent towage, if founded on tort arising out of a duty imposed by law and independent of any contract made or consideration paid for the towage.” *The Temple Emery*, 122 Fed. Rep. 180, 181; *The John G. Stevens*, 170 U. S. 113, 124.

Did the libelees exercise the care and precautions that the circumstances of weather and sea and the unusual and inherent weakness of the house-boat, as a craft in the open sea, required?

“No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business.” *The Nitro-Glycerine Case*, 82 U. S. 537.

Was the disaster which destroyed the house-boat unavoidable? *The Nitro-Glycerine Case* above cited offers the following standard of carelessness in such matters:

“The measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own.”

I am of the opinion that the accident was not una-

voidable, and that the libelees failed in exercising the care and caution which the circumstances reasonably required, and that the damage to the house-boat was due to such failure. Mr. Agassiz, one of the libelees, was fully acquainted with the character of the house-boat, having lived in her, and testified that she was constructed and suitable for transportation on inland waters only, and not suitable for traffic on the ocean, and that the studding of the house part was attached to the scow by means of nails about the size of tenpenny nails. He was familiar with the water between Pearl Harbor and Honolulu. Although he says he put off the tow for two days in order to get the favorable conditions which prevailed when it started, yet the wind was so strong during the afternoon the tow was attempted, according to Mr. Dunn, a disinterested witness, that the yacht he was sailing in close hauled near the tow carried her lee rail in the water, and there was "a heavy swell on, which would make a person not "used to going to sea good and seasick." Mr. Scott said, "The water was perfectly smooth, there was not even a swell." Mr. Wheeler said, "The water was smooth; of course there was a small "ocean swell," and admitted that there was enough motion to open up the seams that had become dried out above the water line, and, with the assistance of the water in the hull, to rock the house loose from the hull. The witness Strem said that the house was fastened to the hull with twenty-penny nails, and that the rocking of the house-boat loosened the fastenings of the house. These last three witnesses were introduced by the

defense, and were employees of the libelees at the time of the accident. With this evidence there is no doubt in my mind that there was a swell that made it obviously dangerous for the house-boat to go to sea.

The witness Dunn testified that from midnight to five o'clock A. M. was the best time for smooth water between Pearl Harbor and Honolulu under ordinary conditions. The witness Nielsen said: "When the trade winds settle down steady it always blows pretty strong in the afternoon until about sundown. * * * In southerly weather it is different." It was trade wind weather. The house part of the house-boat was a two-story structure, an edifice peculiarly unsuitable for being towed through a sea with such a swell as would cause it to roll to any appreciable extent. The witness Scott said: "I wouldn't have undertaken to tow her in such a swell." His evidence was, there was no swell. The sea was in such a condition as made it dangerous to take it to sea, as the result proved.

"There may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it." *The Steamer Webb*, 81 U. S. 414.

"If the state of the weather made the trip unsafe, it was respondent's duty to have waited for better weather." *The Mohler*, 88 U. S. 230; *Tucker vs. Gallagher et al.*, 122 Fed. Rep. 847.

That the inherent weakness of the house-boat was not such as to make it unsafe to take her to sea under any conditions is shown by the fact that she was towed from Honolulu to Pearl Harbor in the open sea by the libelees within a year before the accident.

The Temple Emery case cited above is instructive in relation to the questions raised in this. A firm hired a combined dredger and pile-driver and undertook to tow it in the open water of the lake to the place where it was to be used. The scow was 16 by 50 feet and 5 feet deep; at one end was the pile-driver, 40 feet high; the dredging appliances were at the other end and the boiler and engine amidships, making a craft as unsuitable for standing the motion caused by a considerable swell as the house-boat of this case. With this craft the tug-boat also took in tow 200 boom sticks. The Court found that the tow started without immediate necessity in unfavorable weather; that the tow line was attached to one corner of the scow only, when it should have been attached to both by means of a bridle to prevent yawing, and that the boom sticks endangered the tow by keeping it exposed to rough water longer than would have been the case if the scow had been towed alone. She capsized and the pile-driving and dredging attachments were lost. The Court, in holding the tug liable, said:

“The maritime skill and care thus called for is such as is reasonable in that service and under the conditions presented—such as may reasonably be demanded under ‘the peculiar circumstances and emergencies of the case.’” 122 Fed. Rep. 182.

This test of responsibility is recognized in the *Joseph Peene*, 130 Fed. Rep. 489.

The libelant claims a total loss and damages of twenty-five hundred dollars, that being the damages

agreed upon in the lease in case of a total loss. Counsel for the libelant have pressed this point under the rules of practice in maritime insurance. But it is doubtful if such rules can be applied to a case of this kind, and if they could, there has been no abandonment of what remained of the house-boat—a scow in good condition, an indispensable condition of recovery for total loss in insurance cases. The United States reports have some cases of collisions in which a tendency is shown to approximate to the rule in marine insurance. The *Falcon*, 86 U. S. 75, shows this tendency perhaps the most conspicuously, but the fact that the answer admitted a total loss appears to have had some influence in this decision.

The measure of damages in this case is the injury to the house-boat at the time of the accident. Mr. Hughes, who built her, says the scow cost seven hundred dollars, and that he would not undertake to put the house-boat back in her old condition as originally constructed, less the deterioration of the hull, for less than two thousand dollars. Mr. Almy says the original cost was about twenty-two hundred and fifty dollars, and fitting her up for libellees' use cost nearly three hundred dollars more, making a total of twenty-five hundred and fifty dollars. Why the superstructure should now cost two thousand dollars when it originally cost but fifteen hundred and fifty, or eighteen hundred and fifty with the additions made, the scow having cost seven hundred dollars, was not explained. No evidence has been introduced as to the deterioration of the house-boat, and yet there must

have been some. My estimate of the damages suffered by the libellant is eighteen hundred and fifty dollars, and a decree will be entered for that amount with costs.

SANFORD B. DOLE,

Judge, United States District Court.

Honolulu, September 15th, 1904.

[Endorsed]: Title of Court and Cause. Filed Sept. 15, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

In the District Court of the United States, in and for the District of Hawaii.

IN ADMIRALTY—LIBEL IN PERSONAM.

MARY K. ALMY,

Libellant,

vs.

E. J. COTTON, J. B. AGASSIZ and
C. E. COTTON, Copartners, Doing
Business Under the Firm Name and
Style of COTTON BROTHERS AND
COMPANY,

Libelees.

Decree.

At a special September Term of the District Court of the United States of America for the District of Hawaii, holden at the courtroom of the said court in the Judiciary Building, in the city of Honolulu, in said District, on Thursday, the 15th day of September, in the

year of our Lord one thousand nine hundred and four.
Present: The Honorable Sanford B. Dole, District
Judge.

And now, to wit, on this Thursday, the 15th day of
September, A. D. 1904, this above-entitled cause having
been heard on the pleadings and proof, and after briefs
had been filed by the advocates of the respective parties
and due deliberation being had thereon, the Court finds
that the above-named libelant is entitled to recover
therein, and the Court having found and assessed the
amount of said libelant's damage and recovery herein
at the sum of one thousand eight hundred and fifty
(1,850) dollars in lawful money of the United States:

Now, therefore, on motion and application of J. J.
Dunne, Esq., one of the proctors of the said libelant,

It is hereby ordered, adjudged and decreed that Mary
K. Almy, the above-named libelant, have and recover
of and from the above-named E. J. Cotton, J. B. Agas-
siz and E. C. Cotton, copartners, doing business under
the firm name and style of Cotton Brothers and Com-
pany, libelees, and that said E. J. Cotton, J. B. Agassiz
and C. E. Cotton, copartners, doing business under the
firm name and style of Cotton Brothers and Company,
said libelees, pay to Mary K. Almy, said libelant, the
full sum of one thousand eight hundred and fifty (1,850)
dollars in lawful money of the United States, together
with costs and disbursements of said libelant in the
above-entitled cause, hereafter to be taxed; to the ren-
dition and entry of which said decree, said libelees now
and here except.

Given, made and dated at Honolulu, Hawaii, this 15th day of September, A. D. 1904.

SANFORD B. DOLE,
Judge of the Above-named Court.

The above decree is hereby approved as to form.

ATKINSON,
JUDD,
MOTT SMITH,
R. W. BRECKONS,
Proctors for Said Libelees.

[Endorsed]: Title of Court and Cause. Entered in Judgment Book 1, at page 312 and filed Sept. 21, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ, and
C. E. COTTON, Copartners Doing
Business Under the Firm Name and
Style of COTTON BROTHERS AND
COMPANY, Libelees.

Notice of Appeal.

To Mary K. Almy, Libelant, and J. J. Dunne, Esq., and
A. S. Humphreys, her Proctors:

You and each of you are hereby notified that the li-
belees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, do-
ing business under the firm name and style of Cotton
Brothers and Company, libelees in the above-entitled
cause, intend to and hereby do appeal from the final
order and decree of the District Court of the United
States in and for the Territory of Hawaii, entered in
the above-entitled cause on the 15th day of September,
A. D. 1904, to the United States Circuit Court of Ap-
peals for the Ninth Circuit; and you are further notified
that the said libelees intend to introduce new proofs on
appeal.

Done at Honolulu, T. H., September 23, 1904.

ALBERT F. JUDD,

R. W. BRECKONS,

Proctors for Libelees, E. J. Cotton, J. B. Agassiz and
C. E. Cotton, Doing Business Under the Firm Name
and Style of Cotton Brothers and Company.

Received a copy this 23d day of September, 1904.

J. J. DUNNE,

A. S. HUMPHREYS,

Proctors for Libellant.

[Endorsed]: Title of Court and Cause. Filed Sep-
tember 23, 1904. W. B. Maling, Clerk. By F. L. Hatch,
Deputy Clerk.

— — — — —
*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libellant,

vs.

E. J. COTTON, J. B. AGASSIZ, and
C. E. COTTON, Copartners Doing
Business Under the Firm Name and
Style of COTTON BROTHERS &
COMPANY,

Libelees.

Petition for Allowance of Appeal.

To the Honorable SANFORD B. DOLE, Judge of the
District Court of the United States, in and for the
Territory of Hawaii:

The libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners, doing business under the firm name and style of Cotton Brothers and Company, libelees in the above-entitled cause, conceiving themselves aggrieved by the order and decree made and entered in the above-entitled cause on the 15th day of September, A. D. 1904, do hereby appeal from the said order and decree, to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed with the clerk of the District Court of the United States in and for the Territory of Hawaii, their notice of appeal, pray that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon the said order and decree as made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and also that an order may be made fixing the amount of security which the libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, should give and furnish upon such appeal, and upon the giving of such security all further proceedings in this court be superseded and stayed until the determination of the said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 23, A. D. 1904.

ALBERT F. JUDD,

R. W. BRECKONS,

Proctors for Libelees, E. J. Cotton, J. B. Agassiz and
C. E. Cotton, Copartners Doing Business Under the
Firm Name and Style of Cotton Brothers & Co.

Service of a copy of the above petition, for allowance of appeal acknowledged this 23d day of September, A. D. 1904.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Libelant.

[Endorsed]: Title of Court and Cause. Filed September 23, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and
C. E. COTTON, Copartners Doing
Business Under the Firm Name and
Style of COTTON BROTHERS AND
COMPANY,

Libelees.

Order Allowing Appeal.

Upon motion of Albert F. Judd, Esq., and R. W. Breckons, Esq., proctors for libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers &

Company, libelees in the above-entitled cause, and on filing petition of the said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees as aforesaid, for order allowing appeal, together with an assignment of errors:

It is hereby ordered that an appeal be and hereby is allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order and decree made and entered in the above-entitled cause on the 15th day of September, A. D. 1904, that the amount of the bond on said appeal be and hereby is fixed at the sum of three thousand (3,000) dollars; and that a certified copy of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

Dated the 24th day of September, A. D. 1904.

SANFORD B. DOLF,

Judge of the District Court of the United States in and for the Territory of Hawaii.

Received a copy this 24th day of September, A. D. 1904.

J. J. DUNNE,

A. S. HUMPHREYS,

Proctors for Libelant.

[Endorsed]: Title of Court and Cause. Filed September 24, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and
C. E. COTTON, Copartners Doing
Business Under the Firm Name and
Style of COTTON BROTHERS AND
COMPANY,

Libelees.

Assignment of Errors.

Now comes E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, appellants herein, and say that in the record and proceedings in the above-entitled matter there is manifest error, and said appellants herein now make, file and present the following assignment of errors, upon which they will rely as follows, to wit:

1. That said Court erred in said cause in holding and deciding that the lease of the house-boat did not contain a provision requiring her to be returned to her owner at Pearl Harbor at the termination of the lease.

2. The Court erred in holding and deciding that the capsizing of the house-boat in question was caused by the swell of the sea.

3. The Court erred in holding and deciding that the house-boat in question had open air-courses.

4. The Court erred in holding and deciding that the house-boat was in the possession of the libelees under the terms of the lease, after July 29, 1903.

5. The Court erred in holding and determining that the accident was not unavoidable.

6. The Court erred in holding and determining that the libelees failed to exercise the care and caution which the occasion required, and that the loss of the house-boat was due to such failure.

7. The Court erred in holding and determining that there was a swell which made it obviously dangerous for the house-boat to go to sea.

8. The Court erred in holding and determining that the witness Scott testified that "I would not have undertaken to tow her in such a swell," and in deciding said cause on the theory that the witness had so testified.

9. Said Court erred in holding and deciding that the libelant was entitled to recover damages from the libelees.

10. Said Court erred in making, rendering and entering its decree on the 15th day of September, A. D. 1904, that the libelant recover of the libelees damages in the sum of \$1,850.00, with costs of suit.

11. Said Court erred in making, rendering and entering its decree in said cause, because its said decree is contrary to law, and to the facts as set forth in the pleadings and records in said cause.

12. Said Court erred in not making, rendering and

entering a final decree in said cause in favor of the libelees.

In order that the foregoing assignment of errors may be and appear of record, said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, appellants herein, file and present the same to said Court, and pray that such disposition be made thereof as is in accordance with law and the statutes of the United States in such case made and provided, and said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, appellants herein, pray a reversal of the above-mentioned decree heretofore made and entered by said Court.

Dated Honolulu, September 23d, A. D. 1904.

E. J. COTTON,

J. B. AGASSIZ and

C. E. COTTON,

Copartners Doing Business Under the Firm Name and
Style of Cotton Brothers and Company.

By their Proctors,

ALBERT F. JUDD.

R. W. BRECKONS.

ALBERT F. JUDD,

R. W. BRECKONS,

Proctors for Appellants.

Due service of the within assignment of errors is hereby admitted and receipt of a copy thereof acknowledged this 23d day of September, A. D. 1904.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Libelant.

[Endorsed]: Title of Court and Cause. Filed September 23, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.
E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

Bond for Costs on Appeal.

Know all men by these presents, that we, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees, in the above-entitled cause, as principal, and Pacific Surety Co. as sureties, are held

and firmly bound unto Mary K. Almy, libelant in the above-entitled cause, in the full and just sum of two hundred and fifty (250) dollars, to be paid to the said Mary K. Almy, her attorneys, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated the 26th day of September, A. D. 1904.

Whereas, lately, to wit, on the 15th day of September, A. D. 1904, in a suit depending in the District Court of the United States, in and for the Territory of Hawaii, between Mary K. Almy, libelant, and E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees, a decree was rendered against the libelees, and the said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees, having obtained from said Court an order allowing an appeal to reverse the decree rendered in the aforesaid cause, and a citation directed to the said Mary K. Almy, libelant, is about to be issued, citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 26th day of October next.

Now, the condition of the above obligation is such that if the said libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name

and style of Cotton Brothers and Company, shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make their appeal good, then the above obligation shall be void; otherwise, the same shall remain in full force and effect.

E. J. COTTON,
J. B. AGASSIZ and
C. E. COTTON,
Copartners,

By their Attorney in Fact, A. S. CANTIN.

[Corporate Seal] PACIFIC SURETY COMPANY.

By ZENO K. MYERS,
Atty. in Fact.

The foregoing bond may be approved as to form, amount and sufficiency of sureties.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Libellant.

United States of America, }
Territory of Hawaii. } ss.

_____ and _____, being duly sworn, deposes and says, each for himself, that he is a resident and freeholder in said Territory; that he is worth the sum of three thousand (3,000) dollars over and above all his just debts and liabilities; and that his property is situate in said Territory, and subject to execution.

Subscribed and sworn to before me this —— day of
September, A. D. 1904.

The within bond is approved as to form, amount and
sufficiency of sureties, as of September 26, 1904.

SANFORD B. DOLE,
Judge U. S. District Court.

Due service of the within bond on appeal is hereby
admitted and a receipt of a copy thereof acknowledged
this 26th day of September, A. D. 1904.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Mary K. Almy, Libelant.

[Endorsed]: Title of Court and Cause. Filed Septem-
ber 26, 1904. W. B. Maling, Clerk. By F. L. Hatch,
Deputy Clerk.

*In the District Court of the United States, in and for the
District and Territory of Hawaii.*

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.

E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

Bond on Appeal.

Know all men by these presents, that we, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees in the above-entitled cause, as principals, and Pacific Surety Co., as sureties, are held and firmly bound unto Mary K. Almy, libelant in the above-entitled cause, in the full and just sum of three thousand (3,000) dollars, to be paid to the said Mary K. Almy, her attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 26th day of September, A. D. 1904.

Whereas, lately, to wit, on the 15th day of September, A. D. 1904, in a suit depending in the District Court of the United States in and for the Territory of Hawaii, between Mary K. Almy, libelant, and E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, libelees, a decree was rendered against the libelees and the said libelees, E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, having obtained from said Court an order allowing an appeal, to reverse the decree entered in the aforesaid cause, and a citation directed to the said Mary K. Almy, libelant, is about to be issued, citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 26th day of October next.

Now, the condition of the above obligation is such that, if the said E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, shall prosecute their appeal to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their appeal good, and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in the said cause, or on the mandate of said United States Circuit Court of Appeals by the Court below, then the obli-

gation shall be void; otherwise the same shall remain in full force and effect.

E. J. COTTON,
JAS. B. AGASSIZ and
C. E. COTTON,
Copartners.

By Their Attorney in Fact,
A. S. CANTIN.

[Corporate Seal] PACIFIC SURETY COMPANY.

By ZENO K. MYERS,
Attorney in Fact.

The foregoing bond may be approved as to form, amount and sufficiency of sureties.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Libelant.

United States of America, }
Territory of Hawaii. }

_____ and _____, being duly sworn, deposes and says each for himself that he is a resident freeholder in said Territory; that he is worth the sum of two hundred and fifty (250) dollars over and above all his just debts and liabilities; and that his property is situated in said Territory, and subject to execution.

Subscribed and sworn to before me this _____ day of September, A. D. 1904.

The within bond is approved as to form, amount and sufficiency of sureties.

Dated September 26th, 1904.

SANFORD B. DOLE,
Judge U. S. District Court.

[Endorsed]: Title of Court and Cause. Filed September 26, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

Clerk's Certificate to Transcript.

United States of America, }
Territory of Hawaii. } ss.

I, Walter B. Maling, Clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 140, inclusive, is a true and complete transcript of the record and proceedings had in said court in the case of Mary K. Almy vs. E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$55.90, and that said amount was paid by appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 17th day of October, A. D. 1904.

[Seal]

WALTER B. MALING,
Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

IN ADMIRALTY.

MARY K. ALMY,

Libelant,

vs.

E. J. COTTON, J. B. AGASSIZ and C.
E. COTTON, Copartners Doing Business Under the Firm Name and Style of COTTON BROTHERS AND COMPANY,

Libelees.

Citation.

United States of America, }
District of Hawaii. } ss.

The President of the United States, to Mary K. Almy, Libelant Above Named, and to J. J. Dunne and A. S. Humphreys, her Proctors, Greeting:

You and each of you are hereby cited and admonished to appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San

Francisco, in the State of California, on the 26th day of October, A. D. 1904, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the Territory and District of Hawaii, in the above-entitled proceeding, wherein E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company, are libelees, and you are libelant, to show cause, if any there be, why the decree entered in the above-entitled proceedings on the 15th day of September, A. D. 1904, in said appeal mentioned, and thereby appealed from, should not be corrected and reversed, and speedy justice should not be done in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 26th day of September, A. D. 1904.

SANFORD B. DOLE,
United States District Judge Presiding in the Above-entitled Court.

[Seal] Attest: WALTER B. MALING,
Clerk.

By Frank L. Hatch,
Deputy Clerk.

Due service of the within citation is hereby admitted and receipt of a copy thereof acknowledged this 26th day of September, A. D. 1904.

J. J. DUNNE,
A. S. HUMPHREYS,
Proctors for Mary K. Almy, Libelant.

[Endorsed]: 39. United States District Court, District of Hawaii. Mary K. Almy vs. Cotton Brothers and Company. Citation. Filed Sept. 26th, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy Clerk.

[Endorsed]: No. 1171. United States Circuit Court of Appeals for the Ninth Circuit. E. J. Cotton, J. B. Agassiz and C. E. Cotton, Copartners Doing Business under the Firm Name and Style of Cotton Brothers and Company, Appellants, vs. Mary K. Almy, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Hawaii.

Filed February 17, 1905.

F. D. MONCKTON,
Clerk.

Libelant's Exhibit No. 1.

Lease.

This indenture of lease made this first day of January, A. D. 1903, by and between Mary K. Almy of Honolulu, Island of Oahu, Territory of Hawaii, hereinafter designated as the Lessor of the first part and Cotton Brothers and Company, a firm doing business at Honolulu aforesaid, hereinafter designated as the Lessees of the second part.

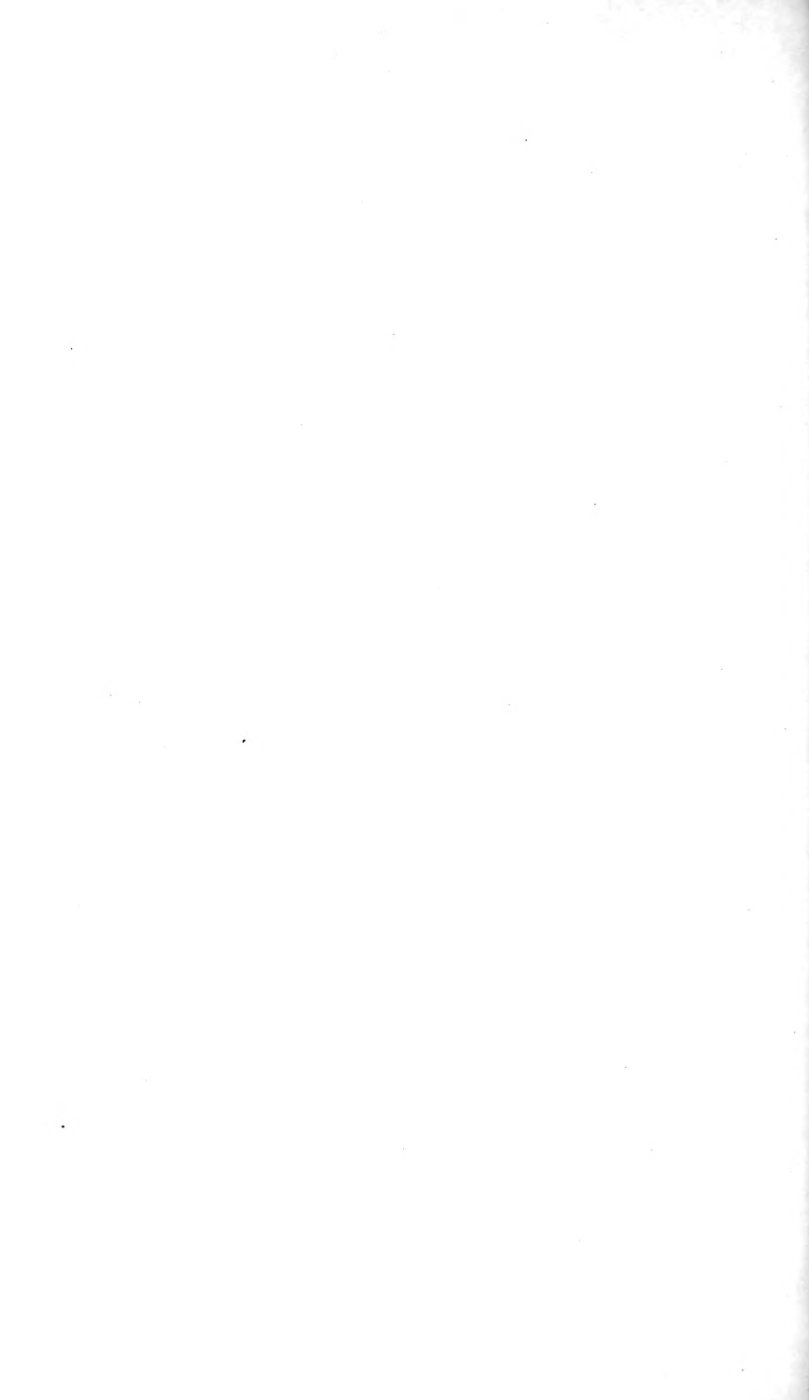
Witnesseth: That said Lessor, for and in consideration of the agreements and covenants on the part of said Lessees hereinbelow mentioned does hereby demise and





U. S. District Court, Hawaii. *Almy vs. Cotton Bros.*
Libelant's Exhibit No. 2. Filed May 23, 1904. W. B.
Maling, Clerk. By F. L. Hatch, Deputy.

No. 1171. U. S. Circuit Court of Appeals for the Ninth
Circuit. Libelant's Exhibit No. 2. Received Oct. 27,
1904. F. D. Monckton, Clerk. By Meredith Sawyer,
Deputy Clerk.



Libelant's Exhibit No. 3.

Honolulu, T. H., August 5th, 1903.

Mrs. Mary K. Almy, Honolulu.

Dear Madam: We beg to inform you that your house-boat, which at the request of Mr. Almy in your behalf we undertook to tow without compensation from Pearl Harbor to Honolulu, suddenly filled with water and careened over on its side without warning on the way up.

We anchored the boat, which was still afloat, and as soon as possible towed the submerged scow into Honolulu harbor. The house on the scow is demolished and we have saved as much of the structure as we could and the scow and everything rescued is now at the end of the Mauka Bishop Estate Wharf. We have a man in charge, but must decline to take responsibility for the boat which is now subject to your direction.

We remain,

Very truly yours,

COTTON BROS. & CO.,

Per A. S. CANTIN,

U. S. Dist. Court, Hawaii. *Almy vs. Cotton Bros.*
Filed May 24, 1904. W. B. Maling, Clerk. By F. L.
Hatch, Deputy. Libelant's Ex. 3.

No. 1171. U. S. Circuit Court of Appeals, for the
Ninth Circuit. Libelant's Exhibit 3. Received Oct. 27,
1904. F. D. Monckton, Clerk. By Meredith Sawyer,
Deputy Clerk.

No. 1171. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelees' Exhibit "A." Received Oct. 27, 1904. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Libelees' Exhibit "B."

Honolulu, June 7th, 1903.

Mess. Cotton Bros. & Co., Boston Bldg., Honolulu.

Gentlemen: In order that I may make my plans for the summer, will you kindly inform me if you intend to keep the house-boat after July 1st and, if so, how long you will probably need possession.

Yours truly,

MARY K. ALMY.

U. S. Dist. Court, Hawaii. Almy vs. Cotton Bros., Libelees' Ex. "B." Filed May 24, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy.

No. 1171. U. S. Circuit Court of Appeals, for the Ninth Circuit. Libelees' Exhibit "B." Received Oct. 27, 1904. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Libelees' Exhibit "C."

Honolulu, July 29th, 1903.

Mers. Cotton Bros. & Co., Honolulu.

Gentlemen: Will you please notify me on what day you intend to bring the House-Boat up to Honolulu, in

order that I may have some one at the R. R. Wharf to receive her.

Yours truly,

MARY K. ALMY.

U. S. Dist. Ct., Hawaii. *Almy vs. Cotton Bros. Libelees' Ex. "C."* Filed May 24, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy.

No. 1171. U. S. Circuit Court of Appeals for the Ninth Circuit. *Libelees' Exhibit "C."* Received Oct. 27, 1904. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Libelees' Exhibit "D."

[Letterhead of Cotton Bros. & Co.]

Honolulu, H. I., June 9th, /03.

Mrs. M. K. Almy, Honolulu, H. T.

Madam: In answer to your favor of the 7th inst. would say that we will probably need the house-boat until the 1st of August.

Yours truly,

COTTON BROS. & CO.,

Per C.

U. S. Dist. Ct., Hawaii. *Almy vs. Cotton Bros. Libelees' Ex. "D."* Filed May 24, 1904. W. B. Maling, Clerk. By F. L. Hatch, Deputy.

No. 1171. U. S. Circuit Court of Appeals for the Ninth Circuit. *Libelees' Exhibit "D."* Received Oct. 27, 1904. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.



No. 1171

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

E. J. COTTON, J. B. AGASSIZ, and C. E.
COTTON, Copartners Doing Business
under the Firm Name and Style of COT-
TON BROTHERS & COMPANY,

Appellants,

vs.

MARY K. ALMY,

Appellee.

MAY

Upon Appeal from the United States District
Court for the District of Hawaii.

BRIEF FOR APPELLANTS.

ALBERT F. JUDD,
R. W. BRECKONS,
Proctors for Appellants.

WILLIAM R. DAVIS,
Of Counsel.



IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

E. J. COTTON, J. B. AGASSIZ and C.
E. COTTON, Copartners Doing Busi-
ness Under the Firm Name and Style
of COTTON BROTHERS AND
COMPANY,

Appellants,

vs.

MARY K. ALMY,

Appellee.

No. 1171.

Appellants' Brief.

This appeal has been taken by E. J. Cotton, J. B. Agassiz and C. E. Cotton, copartners doing business under the firm name and style of Cotton Brothers and Company from the decree rendered by the United States District Court for the Territory of Hawaii awarding damages to the appellee, Mary K. Almy, for the loss of her house-boat. This craft, being a scow with a superstructure of two stories, three rooms in the lower story and two rooms and a veranda in the upper story, was leased by the appellee, Mary K. Almy, to Cotton Brothers and Company, the appellants, under a written

indenture of lease (Record, pp. 155, 160). It was used by the appellants as a lodging-house for their laborers engaged in dredging out the bar at the entrance of Pearl Harbor on the Island of Oahu, in the Territory of Hawaii about 10 miles distant from the Port of Honolulu.

On August 4th, 1903, after the completion of this dredging contract, the appellants started to tow the house-boat from Pearl Harbor to Honolulu, using the steam tug "Kaena" for that purpose. In making up the tow, there were attached behind the house-boat, in tandem formation, two small scows and a small skiff.

The tow proceeded in this manner from Pearl Harbor toward the Port of Honolulu until it reached a point near the entrance to Kalihi Harbor. Here the house-boat became a wreck.

The appellee filed a libel in personam against the appellants in the District Court of the United States, for the Territory of Hawaii sitting as a court of admiralty, for damages in the sum of \$2,500, for the total loss of the house-boat, which she alleged was caused by the carelessness and negligence of the appellants in constructing the tow, in the manner in which the tow was operated and in the selecting of the time for the tow without regard to the conditions of wind and sea prevailing. It was further alleged that the house-boat during the tow was in the possession of the appellants under the lease above mentioned.

An answer was filed by the appellants, averring that the said lease had terminated on July 29th, 1903, or

several days before the tow started, which fact was known to appellee; and that the tow was made under a special agreement between the appellants and the appellee, that the appellants should make the tow solely as a favor to the appellee and should in no manner be held responsible for any loss or damage which might occur while the boat was being moved from Pearl Harbor to Honolulu; and also denying negligence and carelessness in the selection of the time for making the tow or in the manner of constructing or operating the tow. The answer denied also that the boat was a total loss, averring that after the accident everything possible was done to preserve the boat and its superstructure from further loss or damage, and that the accident was due to the fact that the superstructure was not properly built into the scow, but that when originally constructed was merely tacked to said scow with ten-penny nails which became gradually loosened from the rocking of the scow.

The Court rendered its decision (Record, p. 121), holding appellants liable to the appellee in the sum of \$1,850, and for costs, and thereafter gave and made its decree accordingly, from which Cotton Brothers and Company appealed to this Honorable Court.

Cotton Brothers and Company, appellants herein, by their assignment of errors, claim that error was committed by the District Court in the following named particulars:

1. That said Court erred in said cause in holding and deciding that the lease of the house-boat did not

contain a provision requiring her to be returned to her owner at Pearl Harbor at the termination of the lease.

2. The Court erred in holding and deciding that the capsizing of the house-boat in question was caused by the swell of the sea.

3. The Court erred in holding and deciding that the house-boat in question had open air-courses.

4. The Court erred in holding and deciding that the house-boat was in the possession of the libelees under the terms of the lease, after July 29, 1903.

5. The Court erred in holding and determining that the accident was not unavoidable.

6. The Court erred in holding and determining that the libelees failed to exercise the care and caution which the occasion required, and that the loss of the house-boat was due to such failure.

7. The Court erred in holding and determining that there was a swell which made it obviously dangerous for the house-boat to go to sea.

8. The Court erred in holding and determining that the witness Scott testified that "I would not have undertaken to tow her in such a swell," and in deciding said cause on the theory that the witness had so testified.

9. Said Court erred in holding and deciding that the libelant was entitled to recover damages from the libelees.

10. Said Court erred in making, rendering and entering its decree on the 15th day of September, A. D. 1904, that the libelant recover of the libelees damages in the sum of \$1,850.00, with costs of suit.

11. Said Court erred in making, rendering and entering its decree in said cause, because its said decree is contrary to law, and to the facts as set forth in the pleadings and records in said cause.

12. Said Court erred in not making, rendering and entering a final decree in said cause in favor of the libelees.

ARGUMENT.

I.

DURING THE TOW, THE POSSESSION OF THE HOUSE-BOAT BY THE APPELLANTS WAS NOT UNDER THE TERMS OF THE LEAVE BUT UNDER A BAILMENT, THE EXPRESS AGREEMENT OF WHICH WAS THAT IN CASE OF LOSS THE APPELLANTS WOULD NOT BE HELD RESPONSIBLE.

The lease (Record, pp. 155, 160), in accordance with the terms thereof, terminated on the 29th day of July, 1903. It became the duty of the appellants then to re-deliver to the appellee the house-boat at Pearl Harbor, as the lease contained a covenant on their part not to remove the boat from the limits of Pearl Harbor.

The house-boat was at Pearl Harbor when the lease was made (Record, p. 115). There was no duty upon the appellants to return the house-boat to the owner at Honolulu.

The care to be given the boat by the lessors referred to the inland waters of Pearl Harbor, and it is not likely that anyone concerned with the house-boat thought otherwise.

It is highly improbable that appellants should undertake to bring the house-boat to Honolulu without a request considered by as authority.

There can be no question but that appellants did bring the house-boat to Honolulu by the request of Mr. Almy, the husband of the appellee. No matter what Mr. Almy may say on the subject, the testimony of Mr. Agassiz, one of the appellants, must be believed. (Record, p. 97.)

The only doubt on the proposition advanced comes from the fact that appellants have been unable to prove by direct evidence that Mr. Almy was authorized by his wife to make the request which was given. Notwithstanding this absence of direct proof, it is respectfully submitted that all the circumstances in the case show Mr. Almy to have been the agent of his wife and establishes that Cotton Bros. & Co. were justified in complying with his request.

The evidence of the witness J. A. Hughes, who built the house-boat, shows that it was ordered and paid for by Mr. Almy. (Record, p. 39.)

The evidence of Mr. Agassiz shows that all arrangements relative to the leasing of the boat, such as the term of the lease, conditions relative to loss, the amount of rental, etc., were made by Mr. Almy, and that indeed, Cotton Bros. & Co. never had any dealing with Mrs. Almy concerning the house-boat until some time after the lease was executed and delivered. (Record, p. 93.)

The evidence of the witness Agassiz shows that for some time prior to the execution of the lease, Mr. Almy was in possession of the house-boat and exercised full control over the movements of the boat. (Record, p. 92.)

The evidence of the witness Agassiz shows also that under the terms of the lease the house-boat was delivered to the lessees by Mr. Almy. (Record, p. 92.)

The letter (Record, p. 162) introduced in evidence on behalf of the appellants, signed by Mrs. Almy, shows conclusively, it seems, that the owner of the house-boat was cognizant of the fact that the provisions of the lease requiring the house-boat to be delivered at the termination of the lease at Pearl Harbor, were not to be followed and that it was the desire of the owner of the boat to have the same delivered in Honolulu. In other words, as a matter of accommodation to the owner of the house-boat, the appellants undertook to deliver the house-boat at Honolulu.

As we have said above, there is no direct proof in the case that Mr. Almy was authorized to direct the delivery of the house-boat at Honolulu, or to enter into any such arrangement as Mr. Agassiz testified was entered into. Nevertheless, we contend that the testimony shows the existence of such an agency. In a great proportion of cases, agency arises not from the use of express language, or from the existence of well-defined relation, but from the general conduct of the parties. Where one person holds another out as his agent, with certain authority, he is liable for his acts on the ground

of estoppel, whether he actually intends to be bound or not. So when one with full knowledge allows another to represent him as his agent and remains silent when occasion arises for him to speak, he may be held as his principal.

In this case it is respectfully submitted that Mrs. Almy permitted her husband to so act with relation to the house-boat as to estop her from claiming that in all transactions relative thereto, her husband was not her agent. On this point we submit the following authorities:

John vs. Christian, 128 U. S. 374.

Coolidge vs. Puaaiki, 3 Haw. 810.

In re Levinho, 11 Haw. 110.

Mateson vs. Blackmer, 46 Mich. 393.

Hunt vs. Mercantile Ins. Co., 22 Fed. 503.

Reeves vs. Kelly, 30 Mich. 132.

Goss vs. Heilbing, 77 Cal. 190.

Johnson vs. Johnson, 80 Ga. 260.

Bynum vs. Miller, 89 N. C. 393.

The finding of the Court that the house-boat was in the possession of the appellants under the terms of the lease after July 29, 1903 (assignment of errors 4), apparently is not justified from the record.

It was eminently proper for the appellants to have acted upon the statements of Mr. Almy, as the agent of his wife, the appellee, in making arrangement to tow the house-boat from Pearl Harbor to Honolulu.

Mr. Agassiz, one of the appellants (Record, p. 97), testifies concerning the arrangement made by him with

Mr. Almy: "Mr. Almy asked me when we would be through with the house-boat, and I told him I thought we would be through with her in about two months; that would make it either July or August. I think I said we would be through in July. And he then asked me whether I would tow the boat to Honolulu for him, and I said yes, I would tow her back to Honolulu with my own plant as a favor to him, but I would not take any responsibility on the tow. And he said "All right; when you get through with the boat in Pearl Harbor will you tow her to Honolulu for me?" and I said "yes."

The appellants were responsible for the house-boat while it was at Pearl Harbor, but they were not responsible in the same degree of responsibility for the boat on the tow up to Honolulu.

While at Pearl Harbor, the terms of the lease governed their liability.

On the tow from Pearl Harbor, their liability was that of a gratuitous bailee.

While it is perhaps true that one may not make a contract relieving himself from the results of his own negligence (a doctrine which should not be applied where perils of the sea are concerned), yet nevertheless the degree of care to be exercised in the management of personal property, a well-recognized principle of law, is determined largely by the character of the bailment; if the Court should uphold the contention of the appellants in this case relative to the agency of Mr. Almy, it follows that the Court would find the bailment of the house-boat in question subsequent to the termination of

the lease, wholly gratuitous. The bringing of the house-boat to Honolulu was a matter of accommodation to the appellee, and to hold that a high degree of care and prudence on the part of the appellants was necessary under such circumstances, would not be justified by any principle laid down in the authorities.

Story on Contracts, sec. 702.

Parsons on Contracts, vol. 2, p. 112.

II.

THE CONDITIONS OF WIND AND SEA PREVAILING DURING THE TOW WERE NOT SUCH AS TO CHARGE THE APPELLANTS WITH NEGLIGENCE AND CARELESSNESS IN MAKING THE TOW WHEN THEY DID.

It would seem from the evidence of record of the testimony of Captain Scott (Record, pp. 60, 73), Engineer Wheeler (Record, p. 76), both of the tug engaged in the towing, and the witness Strem (Record, p. 87), there was a light trade-wind blowing at the time the tow left Pearl Harbor and that the water was smooth. The witness Scott, a qualified expert towman, testifies (Record, p. 66) that the weather was proper for the business in hand. Against this evidence we have the testimony of Mr. Dunn for the appellee (Record, p. 30), that there was a "good, fresh breeze" blowing at the time.

The Court erred, it is submitted, in believing that the witness Scott, the captain of the tug, testified: "I wouldn't have undertaken to tow her in such a swell" (Record, p. 131), and in deciding the case on the theory

that there was a swell. What the captain did say was (Record, p. 73): "No, I wouldn't have undertaken to tow her in a swell. The water was perfectly smooth. . . . The weather was fine."

The captain further testified (Record, p. 61), that two men were lying down on the front apron of the houseboat all the time, and adds: "If there had been any sea they could not have stayed there; they would have been washed off; they would have got wet." The men in charge of the tow were qualified and competent to perform that work. Suppose the weather was as Dunn says, and they made an honest mistake of judgment as to the suitability of conditions of wind and water, the appellants should not be held responsible.

"Errors of judgment respecting the weather at the time of starting, or, in other respects, on the voyage, is no ground of liability."

The *Ivanhoe*, 84 Fed. 500.

Rilatt vs. The E. V. MacCaulley, Id.

III.

NEGLIGENCE IN THE CONSTRUCTION OF THE TOW WAS SOUGHT TO BE PROVEN, BUT IS NOT SUSTAINED BY THE RECORD.

Apparently appellee abandoned on the trial all attempt to show negligence except as to the construction of the tow.

From the record in this case it would hardly seem that doubts should be entertained on this point.

Captain Scott, of the "Kaena" (Record, p. 66), Engineer Wheeler, of the "Kaena" (Record, p. 78), and Cap-

tain Olesen (Record, p. 81)—Olesen, it may be noted, is an entirely disinterested witness—all testified, after having qualified as experts, that the tow was properly constructed. From the evidence of the first two of these witnesses and that of the witnesses Strem and Agassiz it is apparent that the tow was made in the following manner: *First*, the tug “Kaena”; *second*, the house-boat, 50 by 20 feet in the hull, and having a superstructure of two stories upon it, drawing 13 inches of water or thereabouts; *third*, an empty water scow, 27 by 10 feet approximately in size, and drawing about 7 inches; *fourth*, an empty anchor scow, 22 by 9½ feet approximately, drawing 6 inches more or less; *fifth*, a small skiff “which two men could pick up on the shore.”

Captain Scott, Record, p. 59.

Engineer Wheeler, Record, p. 75.

Captain Oleson, Record, p. 81.

Gus Strem, Record, p. 85.

Witness Agassiz, Record, p. 99.

All of the heavy sand scows used by the appellants in their dredging operations had been brought up to Honolulu the day previous to the accident. None remaining at Pearl Harbor when the “Kaena” started to tow the house-boat to Honolulu.

Captain Scott, Record, p. 57.

Witness Agassiz, Record, p. 99.

What evidence of negligence in the makeup of the tow has the appellee shown?

Mr. Dunn is the only witness for the appellee who testifies that he saw the tow; he confirms the testimony

of the appellants' witnesses as to the order in which the tow was made up. (Record, pp. 29, 30.) It is a surmise on his part, however, that the scows following the house-boat were laden. (Record, p. 29.) There is direct evidence that the scows were empty until wreckage from the house-boat was placed on them after the accident. (Record, pp. 62, 76, 86.)

Captain Nielson, an expert towman and a witness for the appellee, in response to a hypothetical question testified, that the proper way to make the tow up, if the scows in this case had each been the size of the house-boat, was to put the strongest vessel next to the tug and the next strongest after her, and so on. (Record, p. 46.)

Captain Rouse testifies to the same effect and upon the hypothesis that the scows in the tow were sand scows "several times larger and heavier than the house-boat." (Record, p. 54.)

It is respectfully submitted that there is no evidence in the record as a basis for either of these hypothetical questions; that as a matter of fact the scows were each about half the size of the house-boat, and that the force of the testimony of these two expert witnesses for the appellee is to prove that the tow was properly arranged.

The appellants submit that they cannot be considered insurers in the matter of towing this house-boat to Honolulu, and call attention to the following cases in support of this doctrine.

The Webb, 14 Wall. 406, 414.

The E. Luckenback, 113 Fed. 1019.

The Czarina, 112 Fed. 541.

The Carbonero, 106 Fed. 541.

The Startle, 115 Fed. 555.

IV.

THE LIBEL SHOULD HAVE BEEN DISMISSED AS THE EVIDENCE ADDUCED BY THE APPELLEE DID NOT SHOW THAT THE NEGLIGENCE COMPLAINED OF IN THE LIBEL WAS IN FACT THE CAUSE OF THE ACCIDENT.

“It is unnecessary to consider the question of negligence unless it be first made to appear that the negligence complained of was in fact the cause of the injury. If the evidence discloses no injury traceable to the negligence complained of the libel will be dismissed.”

The Aurora vs. The Republican, 25 Fed. 788.

Negligence has been variously defined.

“Negligence is a failure to do what a reasonable prudent person would ordinarily have done under the circumstances of the situation or the doing of what such person under existing circumstances would not have done.”

Backus vs. Stought, 13 Fed. 69.

Harris vs. Union Railroad Co., 13 Fed. 591.

Fuller vs. National Bank, 15 Fed. 875.

Sunney vs. Holt, 15 Fed. 880.

Crandall vs. Goodrich Transportation Co., 16 Fed.

“Negligence may be defined to be the doing of some lawful act in a careless, unusual and improper way, or omitting the performance of some act required by law to be done by which injury results to the person or property of another.”

Stout vs. Souix etc. Co., Fed. Cases, No. 13,503.

“Negligence is the want of that care and prudence which a man of ordinary intelligence would exercise under all circumstances of the case.”

Gravelle vs. Minne. etc. Railroad Co., 10 Fed. 711.

Harris vs. Union Pacific Railroad, 13 Fed. 591.

“Negligence is the want of the exercise of that degree of care which ordinary prudent persons are accustomed to exercise under the light of similar circumstances.”

Moulder vs. Cleveland etc. Railroad Co., 1 Ohio N. P. 361.

There is no rule of law presuming negligence. Negligence must be affirmatively proven.

“The burden of proof of negligence rests on the plaintiff.”

Hall vs. Minne. etc. Railroad, 14 Fed. 558.

Fuller vs. Citizens' National Bank, 15 Fed. 875.

Crew vs. St. Louis etc. Railroad Co., 20 Fed. 87.

“The law does not presume or impute carelessness or negligence, but requires it to be shown by him who alleges it and unless he does show it he cannot recover.”

Menster vs. Armour, 18 Fed. 373.

"In an action for negligence the presumption is that due care was exercised, and the burden of proof is upon the plaintiff to show by a preponderance of credible evidence that the defendant has been guilty of negligence. He must satisfy the jury that the defendant by some act or omission violated some duty; that such violation caused the injury complained of.

Crandall vs. Goodrich Transportation Co., 16 Fed.

75.

V.

THE ACCIDENT TO THE HOUSE-BOAT WAS UN-AVOIDABLE.

It may happen that where a thing bailed is lost or damaged while in charge of the bailee, and the bailee attempts in no way to show how the accident happened, negligent conduct on his part may be presumed from his silence.

The accident to the house-boat is perfectly explainable. Here was a two-story structure tacked to a scow. The witness Strem, an old boat-builder by trade, describes it (Record, page 87) as follows, in response to a question as to how the accident happened: "I could not tell that, only that the house was not strong enough to stand—only tow-nailed with 20-penny nails. Them posts [pointing to model] are only so fastened, so nailed, a little bit of rocking with a high house like that when the tug went to sea would naturally, the minute you would start it, break it loose; that is what happened."

The witness Lyle, a disinterested person, corroborated this by saying (Record, p. 108) that when he examined the scow after the accident the deck of the hull was swept clean.

The witness Wheeler (Record, p. 76) says that when he first noticed anything wrong the house was "breaking away"—substantiating the above testimony.

The house was not in fact built into the scow, and because of the use to which it had been put, with cooking apparatus, furniture, etc., in the upper story, had become weakened, so that the gentle swaying incident to the towing made her give away.

An attempt was made by the appellee to show that the hull of the scow of the house-boat was constructed with air-courses which should have been closed and the witness Dunn (Record, pp. 40, 41), who testified that he had been on the house-boat four times, stated on the stand that the house-boat was so constructed.

We have the direct evidence of the witness Strem (Record, p. 88) and Scott (Record, p. 65), who had lived on the house-boat for months, that she was not built with these air-courses in the hull.

An attempt was made to prove that the house-boat during the period the appellants occupied it at Pearl Harbor had been aground, in order to make it appear probable that the seams of the hull of the house-boat had opened up. The photograph introduced by the appellee in evidence shows, however, upon a close investigation, that the house-boat was not aground, and to this effect the witness Agassiz (Record, pp. 94, 95) and

Strem (Record, p. 88) directly testified. They were continuously about the house-boat while it was being used as a lodging-house.

Witness Scott (Record, p. 72) testified that one edge of the house-boat was on the beach. If this were in fact the case, which, however, is not admitted, it could not have caused the opening of the seams of the hull. An examination made immediately after the accident showed that there was nothing the matter at that time with the hull.

Strem, Record, p. 88.

Hughes, Record, p. 37.

Lyle, Record, p. 107.

The suddenness of the accident as testified to by Captain Scott (Record, p. 74), Engineer Wheeler (Record, p. 76), and boat-builder Strem (Record, p. 86), is extremely significant. The superstructure was a top-heavy box tacked to a substantial scow with small nails. It had served its purpose for six months without showing any signs of structural weakness, and there was no indication that it was otherwise than strong. The hot tropical sun had had its effect on the boards composing the sides of the superstructure, loosening the nails at their base. Every motion on the scow had its effect to pull at the nails already loosened.

The accident was unavoidable, because it could not have been foreseen and guarded against. The appellants had no reason to believe or suppose that the house-boat could not have been successfully brought to Honolulu.

In view of the foregoing, appellants' proctors maintain:

1. Appellants' possession of the house-boat was that of a gratuitous bailee only, and did not make them responsible except for the exercise of ordinary care and prudence, which the record shows was exercised.

2. No negligence has been shown which would warrant a recovery by appellee.

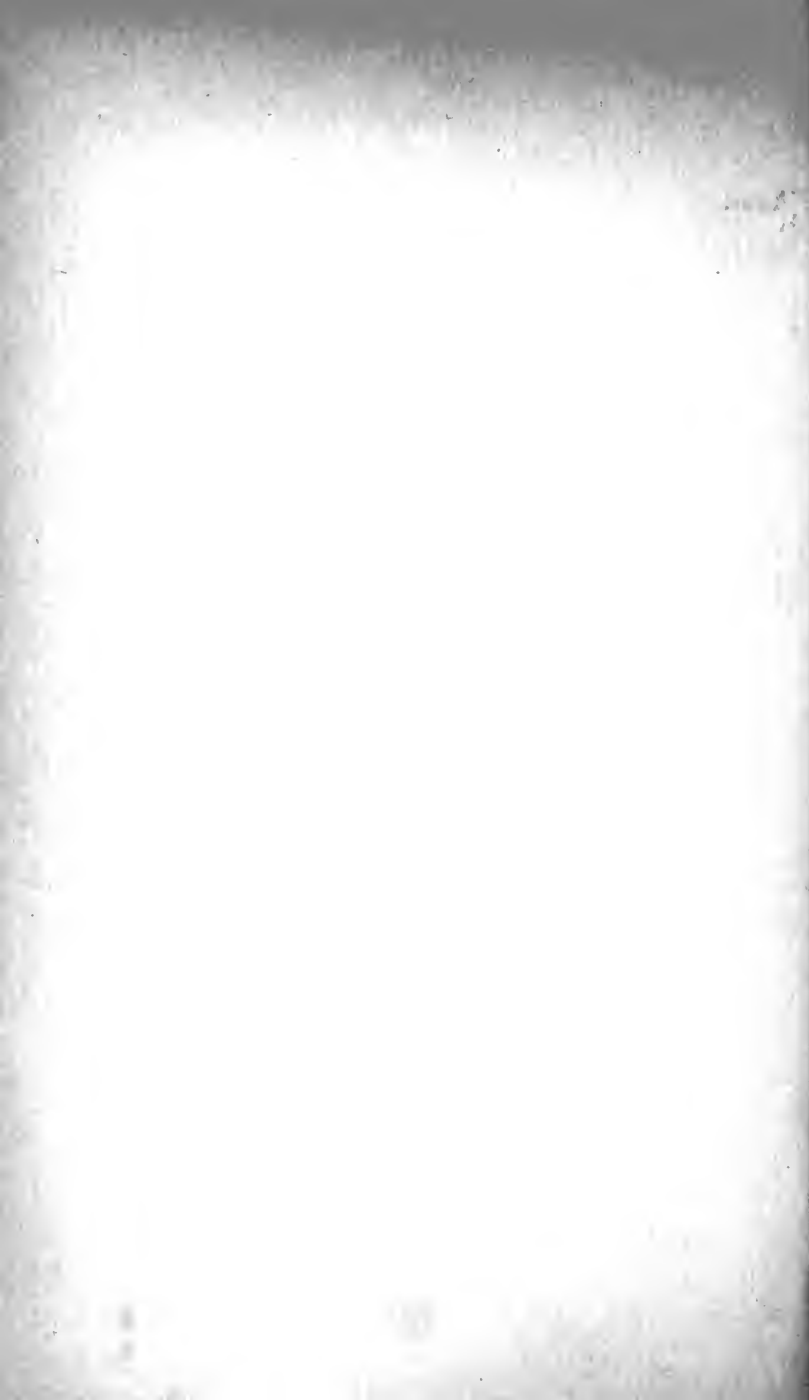
3. The accident could not have been foreseen or avoided by appellants.

It is respectfully submitted that the decree of the District Court for the Territory of Hawaii should be reversed and the libel dismissed.

Honolulu, April 25th, 1905.

ALBERT F. JUDD,
R. W. BRECKONS,
Proctors for Appellants.

WM. R. DAVIS,
Of Counsel.



No. 1171.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

E. J. COTTON, J. B. AGASSIZ, and C. E.
COTTON, Copartners Doing Business Un-
der the Firm Name and Style of COTTON
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Appellants,

vs.

MARY K. ALMY,

Appellee.

FILED
MAY 24 19

BRIEF FOR APPELLEE.

J. J. DUNNE,

Proctor for Appellee.

A. S. HUMPHREYS,

Of Counsel,

Honolulu, H. I.

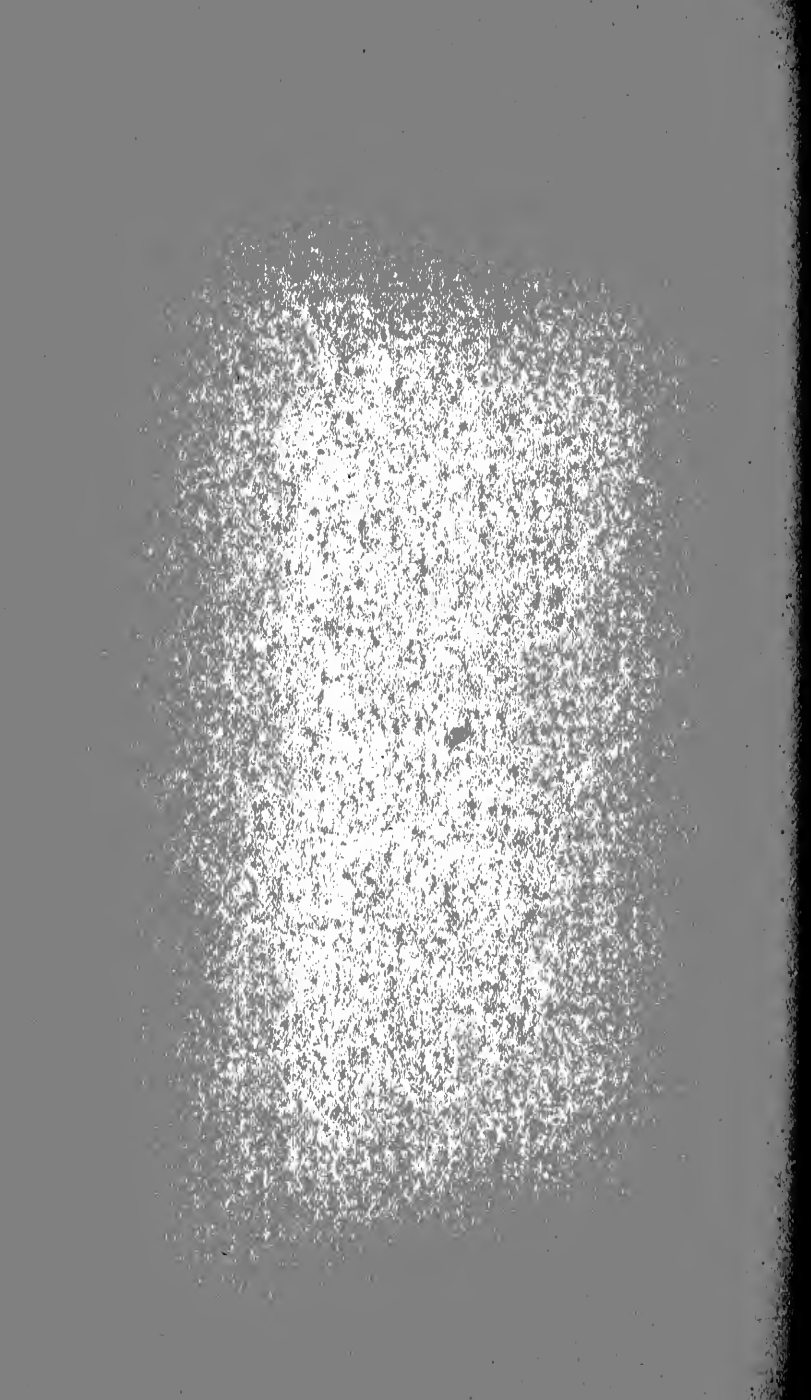
CHAS. PAGE,

EDW'D J. McCUTCHEN,

W. S. BURNETT,

Also of Counsel,

San Francisco, Cal.



No. 1171.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

E. J. COTTON, J. B. AGASSIZ, and C. E.
COTTON, Copartners Doing Business Un-
der the Firm Name and Style of COTTON
BROTHERS AND COMPANY,

Appellants,

vs.

MARY K. ALMY,

Appellee.

BRIEF FOR APPELLEE.

FOREWORD.

The court will recollect that on this appeal, appellants' brief was not served and filed until the day preceding the time set for the hearing, and, of course, a copy thereof could not be received at Honolulu until at least a week later. As the appeal came up from Hawaii the court denied our motion to dismiss it for failure to serve

and file the brief within the time required by the Rules and the cause was continued for hearing until the last day of the term, to permit of our communication with appellee's counsel in Honolulu. Thereupon we cabled such counsel; but it was not until within the last few days that the mail from Hawaii brought word from him together with the following brief, which was, in the main, prepared as a trial brief, upon submission of the cause for decision after the trial thereof. In the very brief time intervening since the receipt of this brief from our associate other engagements of a most pressing character have prevented us from changing its form so as to make it the reply brief of the appellee. We have no apology to offer for the substance of the brief—we submit that it will be found to be a masterly analysis of the evidence adduced at the trial, coupled with the citation of authorities amply supporting the decision which the trial court—it seems to us—unavoidably reached. As appellants' only hope of inducing this court to reach a different result lies in the reviewing of conflicting testimony, the ample references in this brief to the record do not appear to be out of place, and, while we meet our adversary on this ground, we are not unmindful of the principle that this court will not disturb any finding of the trial court based upon conflicting testimony taken in open court, unless such finding is clearly against the weight of evidence.

Perriam v. Pac. Coast Co., 133 F. 140;

Alaska Packers' Assn. v. Domenico, 117 F. 99;

Paauhau Sugar Co. v. Palapala, 127 F. 920;

Baton Rouge etc. Co. v. George, 128 F. 914.

STATEMENT OF THE CASE.

This is an action for damages claimed to arise from a maritime tort. The libel is founded upon the alleged negligence of the libellee; and, of course, the libellee disclaims any negligence in the premises. The libellant was the owner of a certain house-boat. The house-boat consisted of a scow and superstructure, and was used by the libellee as a sort of headquarters for the men in its employ while carrying out a certain contract to deepen the entrance to Pearl Harbor in this Island. The contract being completed, the libellee undertook to tow the house-boat back to Honolulu; but by reason of want of judgment, mismanagement and gross carelessness, the boat became a total wreck. It is of this that the libellant complained, and it is because of this that the libellant asks damages. The house-boat had been leased to the libellee under a lease which required the libellee to return it in good order, and which liquidated the damages, in the event of failure to return in good order, at \$2,500.00.

THE PLEADINGS.

The story of the transaction is told at length in the libel, and the lease under which the libellee had possession of the house-boat is made an exhibit attached to the libel. The answer of the libellee contains very many admissions useful to the libellant. It admits the whole of the first article of the libel. It admits the libellant's ownership of the house-boat, and the execution of the lease in question. It admits the attempted towage from Pearl Harbor to Honolulu, and that the tow-boat, the

Kaena, was operated and controlled by the libellee. It admits that the tow included two laden scows, in addition to the house-boat (Record, p. 21). It admits that one-half mile west of Kalihi entrance, the house-boat "suddenly went over on one side". It admits that the house-boat was then anchored. It admits that the tow-boat then went to Honolulu with the house-boat people, "and with the said laden scows". It admits that later on the tug returned for the house-boat and brought it to Honolulu. In its attempt to describe the accident, this answer tells us that the house-boat "turned over", and that the turning over was due to the fact that the superstructure was so slightly tacked to the scow that it became gradually loosened from the *rocking* of the scow.

This answer contains sundry affirmative allegations. Thus it alleges and sets up the agency of H. N. Almy for Mary K. Almy, and the delivery of the boat to the libellees through H. N. Almy at Pearl Harbor; and it asserts that it was the libellees' duty to redeliver the boat at Pearl Harbor. It is next asserted that the lease by its terms terminated on July 29th, 1903, and that Mary K. Almy was notified thereof; but it should be noted that the claim here is that the lease terminated *by its terms*; and that no claim is made that the lease terminated because of this notice. In article four of the libel it is alleged that at the time of the occurrence of the loss and damage complained of, the house-boat was entirely in the possession and under the control of the libellees under and pursuant to the lease, that neither the libellant nor any agent or representative of hers was, at that time, either in charge or aboard of said house-boat,

and that neither the libellant nor any agent or representative of hers participated directly or indirectly in the facts and circumstances constituting the marine tort complained of, and that the libellant was wholly ignorant of the loss and damage until after the same had occurred and accrued. But when we turn to the answer, we find the libellee asserting "that at no time subsequent to " said 29th day of July, A. D. 1903, was said house-boat " in the possession of the said libellees under or by virtue of said lease, and at no time after said 29th day of " July, A. D. 1903, were the said libellees, or either of " them, in the sole possession or control of said house-boat under or pursuant to the terms of said lease"; and there the answer stops. No attempt is made to deny the allegation of the libel that neither the libellant nor any agent or representative of hers was at the time of the loss and damage either in charge or aboard of the house-boat; no attempt is made to deny that neither the libellant nor any agent or representative of hers participated directly or indirectly in the facts and circumstances constituting the marine tort complained of; and no attempt is made to deny that the libellant was wholly ignorant of the loss and damage until after the same had occurred and accrued. And as part of its affirmative allegations, the answer sets up "that at the termination " of the lease aforesaid, as hereinbefore set forth, the " said libellant requested the said libellees to remove " said house-boat from Pearl Harbor to the Port of " Honolulu, for the convenience of said libellant; that " thereupon, and solely as a favor to and for the convenience of said libellant, said libellees agreed to so

“ remove said boat, under the express stipulation and
 “ agreement, however, that the said libellees would in
 “ no manner be responsible for any loss or damage to
 “ said house-boat which might occur while said boat was
 “ being moved to said Port of Honolulu; that under and
 “ pursuant to said request of said libellant and under
 “ said stipulation and agreement so entered into, said
 “ libellees did, on the 4th day of August, A. D. 1903,
 “ proceed to remove said house-boat from said Pearl
 “ Harbor to the Harbor of Honolulu in said Island of
 “ Oahu”. It may be observed in passing that these alle-
 gations are direct and allege no delivery through an
 agent. And before leaving this description of the plead-
 ings it may not be amiss to point out that the libel, in
 describing the character of the tow, and the mode in
 which that tow was made up, describes it as a “tandem
 tow”; in the answer, no attempt whatever is made to
 deny the allegation of the libel that the tow was a tan-
 dem tow, in which the tow-boat came first, then followed
 the house-boat, and then astern of the house-boat came
 the two laden scows; and the answer in more than one
 place distinctly admits that these scows, which brought
 up the rear of this tandem tow, were laden scows.

STORY OF THE WRECK.

It is thus plain from the pleadings that no controversy exists as to many of the facts:

- (a) That Mrs. Almy owned the boat.
- (b) That she leased it to libellees.

(c) That libellees attempted to tow it from Pearl Harbor to Honolulu.

(d) That the motive power was a tug operated and controlled by libellees.

(e) That those in charge of the operation of towing the house boat as aforesaid, were exclusively the employees of the libellees.

(f) That the tow was made up in tandem, the house-boat being between the tug and the two "laden scows".

(g) That on the way, the house-boat was "turned over", and its superstructure destroyed, only the dismantled scow remaining.

(h) And that as alleged in the libel, and not denied in the answer, neither the libellant nor any agent or representative of hers, was either in charge or aboard of said house-boat during said tow, or participated either directly or indirectly in the facts and circumstances constituting the maritime tort complained of, the libellant acquiring her first knowledge of her loss after the disaster had occurred.

Upon these facts, gleaned from the pleadings alone, it would seem that some explanation of the disaster should be forthcoming from the libellees; they were in charge, control and government of the operation; it was their appliance, handled by their employees, that was doing the towage; it was they who made up the tow; it was they who managed the entire business; and it was while they and their appliances were doing this that the wreck occurred.

But the presumptions arising from the pleadings are enforced by the direct testimony of Allan Dunn, a gentleman of good standing, intelligent, without any motive to falsify, and who relates what he actually saw. He had been yachting with Mr. Hobron, and thus came to be a witness to the wreck. He describes fully the kind of tow, the condition of the wind, the weather and the sea, the periodical tautening of the tow line, the dripping of water from it when it stretched out, the wreck proper, the condition of the light, the condition of the scow next morning, and the best time to tow; and at pages 40 and 41 of the Record, he also describes the air courses which were in the scow.

This story is not contradicted as to its main facts by either Scott, Wheeler or Strem. There are some minor points of difference among the witnesses which will be discussed hereafter, but as to the main facts of the casualty, resulting in the destruction of the house-boat, there is no substantial conflict. Scott emphasizes the necessity for favorable weather in making the tow, at page 57 of the Record; at page 59 he describes the tandem tow; on page 61 he tells us that he saw that the house-boat "got capsized"; on page 62 he explains that the more he towed the more he pulled the house off the scow; on page 62 he explains that he anchored the remains of the house-boat, and took the scows to Honolulu; on page 63 he tells us that when he returned from Honolulu he found that "the house was gone"; and then on page 64 he says that he towed what was left to Honolulu, "and " it took nearly three hours to go to Honolulu from " there. I was not more than two miles from the mouth

“ of Honolulu Harbor, so you can imagine the condition “ it was in”. Captain Scott never examined the hull very thoroughly, and was not aware of any air courses, saying, “I never saw any” (page 65); purely negative testimony which in no way meets the affirmative testimony of Allan Dunn.

Stitt v. Huidekopers, 84 U. S. (17 Wall.) 384;

Pacuhau Sugar Plantation Co. v. Palapala, 127 Fed. Rep. 925.

There may have been innumerable air courses that Captain Scott “never saw”; and he nowhere pretends that he ever looked for any of them; he admits that “ there are little ports inside around the deck, out towards the sides of her” (65). Both on direct and on cross examination, Captain Scott admitted that the libellees’ contract at Pearl Harbor was finished and that everything was to be towed up at once to clear up the whole job (Record, pp. 56-7, 66-7); and from this testimony, it would seem as if “the safety of the tow was “ subordinated to the purpose of saving an extra trip “ by the tug”.

The Temple Emery, 122 Fed. Rep., 180, 183-4.

Captain Scott, on cross examination, distinctly admits that neither the house-boat nor the scows were provided with rudders: “Q. Captain, you said something about “ putting the scows behind the house-boat to act as rudders for the house-boat? A. Yes, sir. Q. Then the “ house-boat didn’t have a rudder? A. No, sir. Q. Did “ these scows have rudders, Captain? A. No, sir”

(Record, p. 69). And on cross examination, Captain Scott directly admits that the only people in charge of the transaction were Cotton Brothers' people: "Q. I will ask you if there was anybody aboard the Kaena, that house-boat, or aboard the scows at any time during this transaction except employees of Cotton Brothers? A. No, sir" (Record, pp. 69-70). And Captain Scott's theory and explanation of the loss complained of, developed on cross examination, involves crass negligence. He tells us that the house-boat had been ashore at one end for six months (p. 70); that these were the six months just prior to the tow (p. 70); and that he knew what he was talking about because he "towed her to Pearl Harbor and lived aboard of her all the time down there" (p. 64). Captain Scott tells us that the fact that one end of the house-boat was ashore was thoroughly well known because, if for not other reason, of the plank from the boat to the dry land (p. 72). Captain Scott further tells us that when the tow in question began he actually pulled the house-boat off the shore (p. 72); and he explains that a good part of her bottom rested on the sand beach (p. 73), and he explains that the effect of all this was that "her seams opened up from naturally lying too long on the beach" (p. 71); and that she capsized "simply because she had been lying there so long her seams opened up by towing her" (p. 70). He admits that he would not have undertaken to tow her in a swell (p. 73); and, quite in line with the open seams that he knew of, he admits that "the hull filled under the floor and she naturally went over as suddenly as that" (p. 74).

NOR DOES THE TESTIMONY OF WHEELER ASSIST THE
LIBELLEES.

Wheeler admits the tandem tow (p. 75). He admits that there was "a small ocean swell" (p. 76). He further admits that there were wind waves also, describing them as "very small wind waves" (p. 76). He admits that the northeast tradewind was blowing (p. 76)—a wind which Captain Nielsen, without any contradiction whatever, describes as a head wind for a vessel coming from Pearl Harbor to Honolulu, a wind which would make a swell in the sea (pp. 47-8). In describing the accident, this witness Wheeler involuntarily shows the presence of the very swell and sea which one would expect at that place. He says: "I was seated in the door of the " engine-room, and I looked back and saw the house-
" boat beginning to careen to one side and saw the house
" breaking away from the deck on the starboard forward
" corner by that first window there (pointing to model),
" calling this the starboard end, because the bridle is on
" this end of the boat. Q. What do you mean by
" breaking away"? "A. Breaking away from the hull,
" from the bottom of the vessel, *and was bending and*
" *swaying like that* (gesticulating) *with the motion of*
" *the waves; whenever she rolled that end* (pointing to
" model) *appeared and then would go down again"*
(Record, pp. 76-7). And this witness, after the Allan Dunn episode, on page 80, explains his theory of the disaster in terms which fasten negligence upon the libellees. He said: "The Court:—So far as you know what
" was the cause of the disaster to the house-boat? A.
" Well, as far as I know it was caused by being laid up

“ there on the—well, practically on the beach; at differ-
 “ ent stages of the water it would be afloat and then at
 “ one end, in-shore end, all on the beach. While lying
 “ there in still water, in my opinion, she dried out above
 “ the water line and her seams opened up. Then the
 “ house was not properly fastened to the hull for an-
 “ other thing, and when she got out and got into the sea
 “ *the motion opened up the seams a little bit*, and as she
 “ got more water into her, that motion became more
 “ aggravated, and when she commenced to rock and
 “ rocked the house loose from the hull, she carried
 “ away”.

Strem was the representative of Cotton Brothers (85, 97-8); and as such, made up the tow (p. 85). He never saw any air courses (p. 88). He contradicts Scott and Wheeler as to the boat being aground, admitting, however, the plank running from the boat to the dry land (p. 88). His theory of the accident presupposes the existence of sufficient swell and sea to detach the superstructure of the house-boat from its scow. “Q. And
 “ your theory of this accident is that the house-boat, by
 “ reason of the rocking of the house-boat, got detached
 “ from the hull? A. Yes. * * * Q. And then
 “ it was the movement, the rocking of the house-boat,
 “ that was strong enough to detach that house from the
 “ hull? A. Yes. It loosened the fastenings of the
 “ house” (Transcript, pp. 88-9). From this resume it is submitted that there can be no doubt as to the substantial correctness of Allan Dunn’s testimony.

ARGUMENT.

THE NATURE OF NEGLIGENCE.

The definition most frequently quoted is the celebrated one of Baron Alderson, that "negligence is the omission " to do something which a reasonable man guided by " those considerations which ordinarily regulate the " conduct of human affairs would do, or doing something " which a prudent and reasonable man would not do". This definition stands quoted and approved by able jurists, text writers and lexicographers.

The Nitro-Glycerine Case, 82 U. S. (17 Wall.) 536;

Mok's Underhill Torts, 271;

Saunders, Negligence, introduction;

Rapalje & Lawrence Law Dict., negligence.

Perhaps as good a definition of negligence as could be desired, covering sins not only of commission but also of omission, will be found in the following, taken from an opinion of the Supreme Court:

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion."

R. R. v. Jones, 95 U. S. 439, 441-2.

There was no obligation upon Mrs. Almy to anticipate the negligence of these libellees; she is not chargeable with negligence in failing to anticipate their negligence and in not providing against it. Every one has the right

to presume that others will act in a lawful and proper manner, and consequently the law will not hold it imprudent in her to act upon the presumption that the others would do their duty.

2 Thompson, Negligence, 1172;
Shearman & Redf., Negligence, p. 31;
The Robert Lewers, 114 Fed. Rep. 849;
Nitro-Glycerine Case, 82 U. S. (15 Wall.) 524;
Jetter v. R. R., 2 Kees (N. Y.) 154;
Earhart v. Youngblood, 27 Pa. St. 323;
Curtis v. Mills, 5 C. & P. 489;
Deyo v. R. R., 34 N. Y. 9.

Nor is custom or habit any excuse for these libellees, even if such custom or habit were proved in this regard. A person charged with negligence cannot show that the act was customary among those engaged in a similar occupation, or those placed under like circumstances, and owing the same duty. Such an attempt would be in effect to show as an excuse for the defendant's negligence, a custom of others to be equally negligent.

Fletcher v. B. & P. R. R., 168 U. S. 135;
R. & O. Nav. Co. v. B. M. Ins. Co., 136 Id. 408;
G. T. R. R. v. Richardson, 91 Id. 454;
Cleveland v. Steamboat Co., 5 Hun. 523;
Judd v. Fargo, 107 Mass. 264;
Hinkley v. Barnstable, 109 Id. 126;
Littlejohn v. Richardson, 32 N. H. 59;
Ill. R. R. v. Smyser, 38 Ill., 354;
Hamilton v. R. R., 36 Iowa, 31;
Tripp v. Lyman, 37 Me. 250.

And with special reference to tow-boats, the rule as to negligence is thus clearly stated in a very recent case:

“The authorities clearly establish the doctrine that the liability of a tug for damages caused by negligent towage is ‘founded on tort arising out of the duty imposed by law and independent of any contract made, or consideration paid or to be paid for the tug’ * * * While the undertaking to tow does not assume the obligation of an insurer, nor liability as a common carrier, it requires the exercise of ‘that degree of caution and skill which prudent navigators usually employ in similar services’; and if loss occurs from failure or neglect therein, the towing steamer must respond in damages. The maritime skill and care thus called for is such as is reasonable in that service and under the conditions presented—such as may reasonably be demanded under ‘the peculiar circumstances and emergencies of the case.’”

The Temple Emery, 122 Fed. Rep. 180, 181-2.

ELEMENTS OF NEGLIGENCE.

A careful examination of the transcript will disclose many particulars in which the libellees failed to take those precautions which a reasonably prudent man would have taken under similar circumstances.

1. *The Tow was not carefully constructed.*—The testimony upon this subject alone is sufficient, we submit, to convict these libellees of negligence. All parties agree that the tow was a tandem tow, and that the house-boat was placed between the tug and the scows. Whatever may be the vagaries of the oral testimony, the sworn answer of the libellees describes the scows as, and admits them to be, laden scows; and thus we find a house-boat,

which was never intended to tow anything or to be subjected to unusual strains, placed between the pull of the tug ahead and the pull of the scows astern. Moreover, as Scott tells us, neither the house-boat nor the scows were provided with rudders; and we scarcely needed the testimony of Captain Neilsen (p. 49) to tell us that the house-boat would thus become subjected to an additional and a severe strain. After all, it is but plain common sense that, assuming that other conditions *were* carefully chosen, if the houseboat had been towed at the end instead of the middle, or (if the libellees had not been in such a hurry to get their appliances to Honolulu upon completing their contract) if the house-boat had been towed alone, this occurrence need not have happened.

But there is positive and direct testimony in the record establishing the recklessness of the method employed. Captain Neilsen, an old, certified shipmaster, of many years' experience in steam, familiar with towage and familiar with these Island waters, plainly tells us that the tow was improperly made up, and gives his reasons for it, and fully explains the "double drag" and the strains to which the house-boat would be subjected. The northeast trade wind being a head-wind coming from Pearl Harbor and causing a swell, and the rudderless conditions of the tow, would be obvious circumstances emphasizing the improper conditions surrounding the house-boat; and he further tells us, the safe method of towage, as applied to that house-boat, would have been to have towed it alone.

Captain Neilsen, Record, pp. 47-51, 51.

And the views of Captain Neilsen are fully endorsed by Captain Rouse, another duly certificated master of steam vessels, with about three years' experience in tow-boating (Record, pp. 51-2).

It is submitted that the opinions of these experts are undisturbed by the extraordinary testimony of Olsen, the partisan advocate produced by the other side; and when it is recalled that this willing witness, after balking at the question whether it was careful and prudent to attempt to tow an open-seamed house-boat from Pearl Harbor to Honolulu, finally sort that, with a fair breeze, some swell and a moderate sea, it would be proper, careful, cautious and prudent seamanship to tow such a vessel (82-4); some justification will be found for the view that his seamanship is as reckless as his swearing. It is not too much to say that if he presented such views as these to the Board of Supervising Inspectors it would cost him his license. The testimony of Wheeler is disposed of by that of Allan Dunn; and that of Strem may be dismissed with the remark that, as the employee of libellee "in charge" at Pearl Harbor, he could hardly be expected to testify otherwise than he did.

The law upon the subject needs no elaboration. The principle to be invoked is simple and direct: It was the duty of the tug, in making up the tow, to see that it was properly constructed. "If she failed in this duty, she " was guilty of a maritime fault."

The Quickstep, 76 U. S. (9 Wall.) 665.

2. *The House-boat should have been towed alone.*— Captain Scott, a witness for libellee, lets us into the

secret of the unusual tow. He tells us that the libellee had just completed a contract at Pearl Harbor, and that, on August 3rd, the tug had been busy bringing up to Honolulu "material left over from the work there". And the idea then was that, on the next day, "*if the water was smooth*", they "would bring up the house-boat and "these two scows behind, *and clean up the whole job*" (Record, 57, 66-7). It was this undue haste, it was this desire to "*clean up the whole job*", and it was this anxiety to save an extra trip for the tug, which had so much to do with the inexcusable carelessness of the transportation; if more thought had been bestowed upon the property committed to their care, and less upon getting the whole job cleaned up, the proverb that "Haste makes waste" would have lacked this additional and costly illustration.

The Temple Emery, 122 Fed Rep. 180.

Captain Neilsen tells us, and his testimony in that behalf is wholly uncontradicted, that the safer method would have been to have towed the house-boat alone. Upon what principle of care and prudence can these libellees be permitted to adopt the less safe method? And is their anxiety to "*clean up the whole job*" and to avoid an extra trip for the tug, to exculpate them from the consequences of their recklessness?

3. *Common prudence would have dictated the closure of the air courses.*—When the tug and tow started from Pearl Harbor, those in command, who were all employees of libellees, knew, if they knew anything at all, that they would encounter the northeast trades—a head-wind that,

as Captain Scott tells us, "has an effect on a big house like that" (Record, p. 60). And when they left Pearl Harbor, they did actually encounter the northeast trade wind, as Wheeler distinctly informs us (76). And that there was more or less sea on, and that the house-boat had more or less motion, with a freeboard of only 23 inches (Scott, 71-2), clearly appears from the testimony of Dunn, Scott, Wheeler and Strem—Strem even claiming that the violence of her motion "was strong enough" "to detach that house from the hull" (89).

But the hull was fitted with air courses—a not unusual and very reasonable improvement, particularly in this climate. These air courses were minutely described by Mr. Allan Dunn on pages 40-41 of the Record, and there is, as already pointed out, no testimony worthy the name, in contradiction. It nowhere appears that these air courses, which were open to the outside (Dunn, 41), were closed up. Scott nowhere pretends that he took this reasonable precaution. His testimony upon the subject is supremely negative; he "never saw any" air courses (65); and Strem, likewise, "never seen them" (88).

Captain Neilsen, however, was interrogated with reference to the propriety of closing up these air courses, as a preliminary to the tow; and he plainly said that it would not be an easy matter to close them up, but also "much safer" (49-50). To this intrinsically sound testimony, the only reply vouchsafed is, not that the air courses could not be so closed as to prevent the intrusion of water into the hull, not that they were even looked for, but that they were never seen. Was there ever a balder confession of ineptitude? The libellee had lived in that

house-boat for six months, and must have been familiar with her. Why were not those air courses seen, particularly where one end of the boat was aground and readily to be inspected from the shore? The libellee knew that the house-boat was to encounter a head wind and a swell, and actually did do so. Why was not the reasonable and prudent precaution taken of closing up these apertures? And was it not the plain duty of the master of the tug to take all antecedent and timely measures of precaution to avoid danger?

The Syracuse, 79 U. S. (12 Wall.) 167.

4. *Failure to select the proper time to tow.*—This tow started from Pearl Harbor about 20 or 30 minutes past two o'clock in the afternoon (Scott, 67); and if the libellee had deliberately determined in advance to wreck the house-boat, it could not have selected a more appropriate time.

Allan Dunn, an intelligent yachtsman, has visited Pearl Harbor, during the last five or six years, at least a hundred times; and, as would be natural with a yachtsman, has made observations as to the conditions of wind, weather and sea at different periods of the day. He tells us that it is “decidedly calmer from twelve (mid-
“ night) to five in the morning than at any other time
“ of the day”, under ordinary conditions, such as existed upon the occasion involved here (Record, pp. 34-5). And he is corroborated upon this point by Captain Neilsen, who adds that the trade wind “always blows pretty
“ strong in the afternoon until about sundown” (48). It is significant that the testimony of these witnesses is

wholly uncontradicted; and the significance of this failure to contradict becomes specially pointed when we revert to the testimony of Mr. Dunn relative to the condition of the wind on the date and at the place of the wreck, detailed on pages 30-31 of the Record.

But the libellee and its employees, including the officers of its tug, had been for six months at least in the immediate vicinity of the scene of the wreck; many of them, at least the officers of the tug, were seafaring men; and they could not have been insensible to their marine surroundings. The work that libellee was engaged upon was marine work: "Cotton Brothers had a dredging contract down there" (Scott, 66); and the success of their enterprise depended, among other things, upon the marine conditions by which the work was surrounded—familiarity with those conditions was indispensable. This is practically surrendered in the record; no claim is made that they were unfamiliar with matters of such moment to the success of their labors; the very references to the weather on pages 57 and 73 presupposes more or less familiarity with the matter; and the testimony of Dunn and Nielsen stands unchallenged. Why, then, was the worst instead of the best time selected for this tow? Why was not reasonable care exhibited in the selection of the time for the tow? "Any prudent officer would have stopped until the weather became calm."

The Mollie Mohler, 88 U. S. (21 Wall.) 230;

Tucker v. Gallagher, 122 Fed. Rep. 847.

5. *Too much was towed at once.*—This was one of the consequences of the wish to "clean up the whole job"

(Scott, 57, 66-7). The "Kaena" is nowhere claimed to be a high-powered boat; in fact, Captain Scott somewhat contemptuously describes her as "a kind of single engine affair" (68). And to illustrate the difficulties under which this "single engine affair" labored, hampered as she was by this house-boat on which "the wind has an effect" (60), and by these two "laden scows" (Answer, *passim*), it may be pointed out that she and her incumbrances started at 2:30 P. M., and the accident happened at 4:45 P. M., during which period of two hours and twenty-five minutes she has traversed only "five and one-half miles to six" (Scott, 67-8). Are not these facts a sufficient commentary upon the lack of care exhibited in this business? Was this a careful way to commit the property of others to the tender mercies of the seas?

6. *The Open Seams.*—Since when has it become careful and prudent to attempt to tow an open-seamed house-boat against a head wind, when the violence of the motion "was strong enough to detach that house from the hull" (Strem, 89)? Captain Scott has been a seafaring man for thirty years (56); he "was raised in a tow-boat" (66); he has seen this houseboat "pretty nearly since she was built" (64); he knew that she had been ashore at one end during the six months just prior to the tow (70); and he knew what he was talking about because he "towed her to Pearl Harbor, and lived "aboard her all the time down there" (64). It was common knowledge that the house-boat was aground, for, as Scott admits, the fact that one end was ashore was well known for the reason, if for no other, that a plank ran from the boat to the dry land, and was used for an

entrance and an exit (72). And when this tow began, Scott was compelled to pull the boat off the shore (72)—a good part of her bottom rested on the sand beach (73). When we reflect that the tide rose and fell at least two feet, according to Agassiz (95), even a landsman, barren of nautical experience, could see that the conditions surrounding that house-boat, lying there and working in that tideway, and shrivelling up in the Pearl Harbor sun, should have suggested the carelessness of pulling her bang off the beach and taking her to sea. Scott tells us that the effect of these surrounding conditions was that “her seams opened up from naturally lying too “ long on the beach” (71), and she capsized “simply “ because she had been laying there so long her seams “ opened up by towing her” (70). He admits that he would not have undertaken to tow her in a swell (73); and quite in line with the opened seams that he must have known of, he further admits that “the hull filled “ under the floor and she naturally went over as sud- “ denly as that” (74). Is it possible that in the situation thus presented, this court can perceive that prudence and care which the law demands from tow-boats? We apprehend not.

It is true that Agassiz actually has the hardihood to swear that the house-boat was “afloat all the time” (94); but his testimony does not deserve a moment’s consideration. He is flatly contradicted by Scott (70-73); he is flatly contradicted by Wheeler (80); he is flatly contradicted by the photograph in evidence, and he is not even supported by the faltering and ambiguous testimony of

Strem, with its "not that I know of", and its admission as to the plank (88).

It may not be improper to add a word upon the lack of consistency, the internal contradictions and the changes of front, apparent in the libellee's case; but since this brief is already too long, we shall limit ourselves to but two illustrations of these infallible earmarks of a decrepit case. *The answer in the case distinctly admits our claim that the two scows were "laden scows"*; and our claim is supported by the testimony of Allan Dunn (29-30) and of Captain Rouse (55), and partly by that of Captain Scott (59), although later on Scott qualifies his first answer (62). But when we advance to the testimony of Wheeler, we are baldly told, in flat contradiction of the answer, that when the tow left Pearl Harbor, the scows "had nothing at all on them" (76)—a piece of testimony dutifully re-echoed by the ubiquitous Strem, Agassiz' factotum, at pages 86-7. And one further illustration of the unreliability of libellee's case, and of the facility with which libellee can change front according to the varying exigencies of the situation, will be found in the testimony relative to the boat having been aground. The very circumstantial testimony of Scott that she was aground, and aground for the six months just prior to the tow, is fully corroborated by Wheeler; but by the time that the unique and delightful Strem invaded the witness-box, it was beginning to dawn upon libellee that even a landsman could understand the folly of towing to sea a house-boat that had been hung up on a shore working for six months is a tideway, and baking and drying in a tropical sun, and

that it might be wise to attempt to "mend its hold". Strem, however, represented the transition period, and his testimony is somewhat unsatisfactory and inconclusive; he gets no farther than "not that I know of" and "not to my knowledge" (88). These inconclusive phrases will not do for Agassiz, however, and he flatly contradicts his own witnesses and declares that the house-boat was "afloat all the time" (94).

These two illustrations—the contradiction of their own answer in the matter of "laden scows" and their attempt to "mend their hold" in the matter of the house-boat being aground—justify reference to the following thought from the Supreme Court:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

Ohio, etc., Ry Co. v. McCarthy, 96 U. S. 258.

THE AFFIRMATIVE DEFENSE.

It is sought, however, to escape liability herein by setting up the affirmative defense that the tow was at Mrs. Almy's risk. The answer sets up that she requested libellees to remove the house boat from Pearl Harbor to Honolulu for her convenience; "that thereupon and solely
 " as a favor to and for the convenience of said libellant,
 " said libellees agreed to so remove said boat, under
 " the express stipulation and agreement, however, that
 " the said libellees would in no manner be responsible

“ for any loss or damage to said house-boat which might occur while said boat was being moved to said port of “ Honolulu”; and that, pursuant to this request, stipulation and agreement the tow was attempted.

The rule is well settled, upon obvious principles, that the burden of proof that the towage was at the owner’s risk, is on the tug:

The American Eagle, 54 Fed. Rep. 1010;

but the requirements of this rule are nowhere complied with in this record. There is not the shadow of a pretense that Mary K. Almy, the admitted owner of the house-boat, ever agreed with anybody that the tow should be at her risk; and Mary K. Almy and H. N. Almy unite in repudiating any such agreement, and unite in repudiating the delegation of authority to any one to enter into any such agreement (104, 109, 113-4).

Failing to establish any agreement with Mary K. Almy, the claim is advanced that the agreement was made with H. N. Almy as her agent; but this claim involved the double burden of establishing, not only that H. N. Almy was Mary K. Almy’s agent, but also that it was within the scope of his authority to allow this towage at her risk and without responsibility upon the tug. It is needless to say that the record is barren of proof upon either point. It is true that Agassiz, under objections duly reserved, was tentatively permitted to detail certain declarations of H. N. Almy, the alleged agent; but Agassiz’s testimony in this behalf is fully and circumstantially denied by Almy, who is corroborated by libellee’s letter of August 5, 1903, which makes the

admission that no request was made by Mary K. Almy, and which makes no claim that the tow was at Mrs. Almy's risk, although mentioning compensation, and written to advise Mrs. Almy of the accident. In this posture of the case, it cannot even be said that the testimony upon this subject is evenly balanced; still less can it be said that the rule requiring cogent evidence has been satisfied.

Eystra v. Capelle, 61 Mo. 578.

But not only has the libellee failed to sustain the burden of proof of this agency, but even if the widest credence were to be accorded to Agassiz' version of Almy's declarations, still neither the alleged agency nor its scope would be established. The story told by Agassiz would nowhere be permitted to support a finding either of the asserted agency or of the extent of the asserted agent's powers; and the matter may be dismissed with the remark that only so recently as April 28, 1904, the Circuit Court of Appeals for the Eighth Circuit observed:

“The admissions and declarations of an alleged agent are alike incompetent to establish his authority or the extent of his powers.”

Walmsley v. Quigley, 129 Fed. Rep. 583, 585.

But even if the agency were established, even if its scope were fixed, even if this alleged contract of towage were proved, yet, given the tug's negligence, the tug would still be responsible for that negligence. That there may be a contract of towage is immaterial, or at most mere inducement to the real grievance complained of; the

libel is not to recover damages for the breach of a contract of towage, but compensation for the commission of a tort; and even if this asserted contract of towage were established, still "the case depends not on any contract, " but on mere tort standing beyond the contract".

N. J. S. N. Co. v. Merchants' Bank, 47 U. S. (6 How.) 344.

Independently, in other words, of any pretended contract of towage, the law impresses upon the tug the duty of using all reasonable care and of avoiding negligence. In brief, that the tow is at the owner's risk is no excuse for the tug's negligence.

The Syracuse, 79 U. S. (12 Wall.) 167;
Alaska Com. Co. v. Williams, 128 Fed. Rep. 362;
The Temple Emery, 122 Id. 180;
The American Eagle, 54 Id. 1010;
The Deer, 7 Fed. Cas. (No. 3737) 351, 352.

THE MEASURE OF DAMAGES.

The loss in this case was a total loss—the house-boat is gone; its identity is destroyed, and the damage done renders the scow valueless for the purposes for which it was designed and held. And this was a new boat; she was built only so recently as July, 1902 (39); and when she was received by the libellees, she represented a value of about \$2550 (39). After the accident, Mr. Hughes, who built the scow, inspected the remains; and he testified

that it would require the expenditure of \$2000 to restore the boat to the same condition in which she was prior to the accident (37-8). In other words, the damage to the house-boat could not be repaired at Honolulu, according to the uncontradicted testimony, without the expenditure of an amount exceeding half her value after the repairs; hence, for this reason also, the loss was total.

Patapsco Ins. Co. v. Southgate, 30 U. S. (5 Pet.)
604, 619.

The loss being a total loss, the stipulation to pay the sum of \$2500 becomes conclusive, and the court has no option but to decree that amount. The very able opinion of Mr. Justice White in a recent cause in the Supreme Court, upon a contract strikingly similar to that at bar, disposes of this and all other questions involving the construction of this lease.

Sun Pr. & Pub. Assn. v. Moore, 183 U. S. 642.

Within the doctrine of this case, it is submitted, with every possible deference for the opinion of the learned judge of the court below, that under the terms of the lease here involved, the decree should have been for \$2500 instead of \$1850; and it is hoped that the decree will be modified according to this view. It is therefore

respectfully submitted that, upon the facts and the law, the justice of the case requires, with the modification suggested, an affirmance of the decree.

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